Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

SCANDINAVIAN HEALTH SPA, INC.,

Petitioner,

vs.

ANDREA FRANKLIN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Lutz Appellate Services, inc.

88 pp

QUESTIONS PRESENTED

Whether an attorney fees award of $169,000 by the District Court is unreasonable under Title VII of the Civil Rights Act of 1964 when Respondent obtained relief on only one minor claim in the amount of $12,229.65?

(1) Whether it is unreasonable to award attorney fees for any services after rejection of a settlement offer, tendered early in the litigation, that was substantially greater than the final judgment, when the offer was rejected because it did not satisfy the fees demanded by the plaintiff's counsel?

(2) Whether attorney fees should be substantially reduced where the primary claims and demands were rejected and success was limited to a discriminatory demotion claim with a back pay award that was one-twelfth of what the plaintiff demanded at the conclusion of trial, $12,229.65 vs. $146,000?

PARTIES TO THE PROCEEDING

Petitioner represented in this Brief is Scandinavian Health Spa, Inc. who is the only defendant remaining in this action. Proceedings against four other defendants, Bally Manufacturing Corporation (Scandinavian's parent) and three Scandinavian employees, Michael Palumbo, Gene Palumbo, and Mark Seaman, were dismissed by the District Court and not challenged on appeal by Respondent. Scandinavian Health Spa, Inc. has no nonwholly owned subsidiaries.

Plaintiff-Respondent Andrea Franklin is a former employee of Petitioner.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is produced at pps. 1a-3a of the Appendix. The decision of the United States District Court for the Southern District of Florida regarding Petitioner's liability is reproduced at pp. 17a-57a of the Appendix (and is cited hereafter as "Liability Decision"). The decision of the United States District Court for the Southern District of Florida regarding Respondent's Application for Attorney Fees is reproduced at pp. 4a-6a of the Appendix (and is cited hereinafter as "Attorney Fee Decision"). The report and recommendation of the Magistrate regarding Respondent's Application for Attorney Fees is reproduced at pps. 7a-16a of the Appendix (and is cited hereafter as "Magistrate's Report").

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit was entered on October 6, 1997, and rehearing was denied on December 1, 1997. The Court has jurisdiction under 28 U.S.C. § 1254(1). Jurisdiction of the Eleventh Circuit was proper pursuant to 28 U.S.C. § 1291, and jurisdiction of the District Court was proper pursuant to 28 U.S.C. §§ 1331, 1343.

STATUTES AND RULES INVOLVED

This case involves Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), which provides that:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fees (including expert

fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

The fundamental question is whether $169,000.000 are "reasonable" attorneys' fees, pursuant to the attorney fee provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), to Respondent Andrea Franklin ("Respondent") who: (1) failed to obtain any equitable or injunctive relief; and (2) received a mere $12,229.65 damage award after (3) rejecting a settlement offer that was greater than the judgment to generate more than two-thirds of their legal fees pursuing their primary claim, which they lost and as to which they did not appeal. Following judgment for Respondent in her lawsuit against Petitioner Scandinavian Health Spa, Inc. ("Scandinavian"), Respondent was awarded $168,978.50 in attorneys' fees Petitioner appealed the award of attorneys' fees, along with the merits of the case.

The Court of Appeals affirmed, without explanation, the District Court's award of attorneys' fees and costs. Again, Respondent moved for an award of $33,750 for attorneys' fees incurred on appeal. The Court of Appeals held that Respondent is entitled to attorneys' fees for the appeal, and it has remanded to the District Court to determine the appropriate amount. Scandinavian now appeals the award of attorneys' fees at both the trial and appellate level on the grounds that the award undermines the attorneys' fees provisions of Title VII in a commonly repeated scenario — where a plaintiff raises potentially meritorious claims of small value (here, Respondent's sexual harassment and discriminatory demotion claims) along with long-shot claims for much larger damages (here, Respondent's constructive discharge claim).

A. Procedural Background.

On January 22, 1992, Respondent sued Bally Manufacturing Corp. ("Bally"), Scandinavian, and three Scandinavian employees, alleging sexual harassment, discriminatory demotion, constructive discharge, and intentional infliction of emotional distress. Respondent dropped her emotional distress claim well before trial, and her back pay demand at the conclusion of trial was $146,000. (Plaintiff's Back Pay Proposal).[1] More than 90% of this amount arose from her unsuccessful constructive discharge claim.

The District Court found Scandinavian liable for sexual harassment[2] and for discriminately demoting Respondent from one division manager position to another. The District Court, however: (1) rejected Respondent's constructive discharge claim; (2) granted no equitable or injunctive relief; (3) dismissed Bally because it was not Respondent's "employer"; and (4) limited Respondent's damages to only $12,229.65, plus interest. *Liability Decision*, App. at 37-42, 52-56.

In moving for $182,212.49 in attorney fees and costs, Respondent's counsel asserted that the request was limited to reasonable expenses in pursuing Respondent's *successful* claims.

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1. Respondent demanded $114,377.57 through the end of 1994, plus $769.23 per week (annualized to $40,000) during 1995. Respondent's back pay demand for 1995, when the District Court issued its *Liability Decision* on October 16, 1995, was $31,666.64.

2. Although the District Court found there was a sexually hostile work environment at the Kendall II Health Club, it did not grant any equitable or injunctive relief because: (1) Respondent had not been subjected to sexual harassment after she was demoted; and (2) she voluntarily had left her employment. *Liability Decision*, App. at 37-42.

They stated that they had excluded expenditures devoted to Respondent's tort claim, claims against individual defendants, the claim that Bally was Respondent's employer, or to the crux of Respondent's case — her constructive discharge claim. (Plaintiff's Motion for an Award of Attorney's Fees and Reimbursement of Costs and Litigation Expenses at 4). These exclusions totaled only 100 hours, or ten percent of the fees incurred.

Respondent's counsel did not file a cross-appeal of the denial of Respondent's primary claim, her constructive discharge claim. Instead, without seeking to increase the relief afforded Respondent, Respondent's counsel expended $33,750 defending Respondent's $12,229.65 judgment.

Respondent's counsel are demanding over $243,000 in attorneys' fees, costs, and interest to recover and defend a $12,229.65 damage award with no equitable relief, along with $28,112.66 in post-judgment interest.

B. The Avoidable Legal Fees.

Defendants sought to resolve the case before expending time, fees and costs to go to trial. On November 11, 1993, Defendants offered Respondent $17,500 to settle the lawsuit, over $5,000 more than Respondent ultimately recovered.[3]

To that point, Respondent's counsel had conducted almost all of their discovery — more than enough to make an intelligent assessment of the merits of odds against recovery on her primary claim for constructive discharge. They had: prepared interrogatories and requests for the production of documents;

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3. This amount was not specified either to include or exclude attorneys' fees.

reviewed Defendants' discovery responses; defended Respondent's deposition; and taken the depositions of the primary witnesses — Mark Seaman, Ron Wilcox, Stuart Dansby and Rhonda Smith. Yet, Respondent's counsel had only expended $47,705 in legal fees — one-quarter of the amount of fees requested and awarded.[4]

Respondent's attorneys refused the offer. Before the District Court, Respondent's counsel offered in explanation that if they had accepted the settlement offer, Respondent "would have effectively received nothing" as the settlement offer did not account for the amount of fees expended in the case. (Plaintiff's Reply Memorandum to Defendant's Memorandum in Opposition to Plaintiff's Motion for an Award of Attorney's Fees and Costs at 4).[5]

If Respondent's counsel had accepted the settlement offer, Respondent would have received more relief that the judgment, and the unreasonable fees expended could have been avoided. Instead, Respondent's counsel refused to accept the settlement offer, and changed this lawsuit into a lawsuit over attorneys' fees.

Again, during the January 19, 1994 mediation conference, Respondent's counsel refused an offer for an amount greater

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4. Robert E. Weisberg had expended $13,287.50 in fees (53.15 hours x $250 per hour), Martha Chapman $6,300 (42 x $150) and Scott Jontiff $28,117.50 (187.45 x $ 150). Respondent's counsel were exaggerating their fees even at that early stage. In a letter sent on November 10, 1993, they estimated their fees at that point to be approximately $60,000. Respondent's counsel were asked to verify in writing the time they had expended to that point; they never did.

5. Respondent's counsel indicated that her back pay as of November 1993 was only $64,000, compared to the evidence Respondent submitted after trial that her back pay should be $146,000.

than the final judgment. Defendants offered $24,000. Yet Respondent's counsel, more concerned with recouping its fees, rejected the offer. As of the mediation conference, Respondent's counsel had nearly completed discovery, yet they had not expended one-third of the attorneys' fees requested and awarded. Between November 11, 1993 and January 19, 1994, Respondent's counsel had: reviewed discovery responses and requests; conducted witness investigations; taken and defended the depositions of ten (10) secondary witnesses. The fees expended to that point were $63,772.50.[6]

Had Respondent's counsel worked to obtain the best result for their client, nearly two-thirds of the fees received could have been eliminated. Other than taking the depositions of two minor witnesses, the remaining fees were expended on trial preparation.

REASONS FOR GRANTING THE WRIT

This case exemplifies a growing trend in which civil rights litigation is converted into "lawsuits over attorney fees" in which the only "winners" are the attorneys, while plaintiffs, defendants, and the court all are losers.[7] Other courts have recognized and

6. Weisberg had incurred fees of $18,725 (74.90 x $250 per hour); Chapman, $7,350 (49 x $150 per hour), and Jontiff $40,297.50 (268.65 x $150 per hour).

7. *See McKenzie v. Cooper, Levins & Pastko, Inc.*, 990 F.2d 1183, 1184 (11th Cir. 1993) ("Increasingly, Title VII litigation is fees litigation, not civil rights litigation."); *see also Report of the Federal Courts Study Committee* 104 (April 2, 1990); Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L. J. 435 (1986); Note & Comment, *For a Few Dollars Less: Equity Rides Again in the Denial of Section 1988 Attorney's Fees to a Prevailing Plaintiff in Farrar v. Hobby*, 5 TEMPLE POL. & CIV. RTS. L. REV. 219 (1996); Comment, *Grossly Excessive Attorney's Fee Requests under the Civil Rights Attorney's Fee Awards Act: Should the Entire Fee Request be Denied?*, 24 U. BALT. L. REV. 149 (1994).

attempted to address this problem. The Eleventh Circuit's response, however, sanctions such a departure by the District Court as to call for an exercise of this Court's supervisory power. The factual scenario here — where the plaintiff uses financially small claims to subsidize failed litigation of long-shot claims for higher stakes — is often repeated, and cries out for this Court's attention.

To start, this Court recognized more than a decade ago that statutory fee awards reflect a balancing of interests. "Congress intended that statutory fee awards be adequate to attract competent counsel, but not produce windfalls to attorneys." *City of Riverside v. Rivera*, 477 U.S. 561, 579 (1986) (citation, quotes, and editing omitted.) *See also Farrar v. Hobby*, 506 U.S. 103, 115-116 (1992); *Hensley v. Eckerhart*, 461 U.S. 424, 434-36 (1983).

The lower courts' complete refusal to reduce the fee award in the face of Respondent's success on only a secondary claim, her failure to obtain the equitable relief she demanded, and her receipt of only a small portion of the monetary damages she demanded under the pretense that her unsuccessful long-shot claims were intertwined with her lone successful claim violates both the letter and spirit of this Court's ruling in *Hensley*. Left untouched, this result represents an open invitation to plaintiffs' attorneys to "piggy-back" weak claims with high stakes onto a minor claim with some reasonable merit, prevail on that one claim, and then argue that a full fee award is justified because the claims are interwoven. Defense attorneys, by contrast, are faced with a Hobson's choice: either accept settlement demands that are far out of proportion to the substantive merits, or continue to litigate with the prospect of losing a minor claim and paying an exorbitant attorney fee award. Defendants should not be forced to make such a choice, and plaintiffs should not be permitted to "hold all of the cards."

Vacating the attorney fee award under the circumstances present in this case is a critical "next step" in alleviating the abuses that pervade attorney fee controversies in civil rights cases. This Court already has held that the extent of a plaintiff's success is a crucial factor in determining the proper amount of a fee award, and even a prevailing plaintiff may be denied fees if "special circumstances would render the award unjust." *Hensley*, 461 U.S. at 429, 434-36 (citations omitted). This Court also has directed that the amount of damages recovered is relevant to the amount of attorney fees awarded, and that

> when the recovery of damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.

City of Riverside, 477 U.S. at 574; *Id.* at 586 (Powell, J. concurring). This Court then pronounced that the most critical factor in determining a fee award's reasonableness is the degree of success obtained, and that plaintiffs who recover only nominal damages and fail to obtain any equitable relief usually are not entitled to a fee award. *Farrar*, 506 U.S. at 112-16. Finally, this Court has relieved a civil rights defendant of attorney fees incurred after a Rule 68 offer of judgment where the judgment recovered by the plaintiff is less than the offer. *Marek v. Chesny*, 473 U.S. 1 (1985).

Second, courts, including this Court, long have recognized that voluntary settlement is the preferential means for resolving Title VII cases and eliminating employment discrimination. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Donaldson v. Tennessee Valley Authority*, 759 F.2d 535, 538 (6th Cir. 1985); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1214 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115

(1979); *Culpepper v. Reynold Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970). Such efforts by employers should be rewarded.

The lower courts' decisions in this case, however, force parties in the opposite direction. Two reasonable settlement offers were rejected, and the only explanation given to date for the rejection is that Respondent's counsel believed that they would not be paid enough. Consequently, significant judicial resources were wasted as the lawsuit now has lasted more than four years longer than it should have just so Respondent's counsel can be rewarded for the failure of their primary claim, the constructive discharge claim. "[R]efusing a reasonable offer of settlement promotes few public interests when the plaintiff ultimately receives a less favorable recovery after trial." *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332, 1337 (4th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 483 (1996).

Vacating this fee award, however, will encourage early settlements of civil rights cases. Faced with the risk of a downside effect if they act only in their own interests, plaintiffs' counsel will be compelled to weigh a reasonable settlement offer that benefits their client against the possibility that they will be penalized if they get greedy pursuing long-shot claims. Such a choice should and will increase the likelihood that reasonable offers will be accepted.

Upholding this fee award, which now totals nearly one-quarter of a million dollars, clearly would turn every attorney fee statute "into a relief Act for lawyers." *City of Riverside*, 477 U.S. at 558 (Rehnquist, J., dissenting). From the moment Respondent's counsel rejected the November 1993 settlement offer because its fees were allegedly not adequately addressed, this case became a lawsuit over attorney fees. In fact, the failure of Respondent's counsel even to appeal the adverse ruling on her discharge claim converted the appellate proceeding into little

more than a defense of the fee award. Such a result "will unfortunately only add fuel to the fires of public indignation over the cost of litigation." *Id.* (Burger, C.J., dissenting). Indeed, "it would be difficult to find a better example of legal nonsense than the fixing of attorney fees by a judge at" $169,000 (not to mention the additional $74,000 in costs, appellate fees and post-judgment interest) for a recovery of $12,229.65 in damages. *Id.* at 587 (Burger, C.J., dissenting).

The result reached by the lower courts stands the attorney fees statutes on their head. By rejecting two reasonable settlement offers because it would not be paid enough and then obtaining a result for their client that was less than what was offered, Respondent's counsel is "rewarded" with a fee award that has nearly quadrupled since the first settlement offer was made. By contrast, for its efforts in tendering two reasonable settlement offers and achieving a result that is better than what it had offered, Scandinavian is "rewarded" with a double punishment. It has to pay its own attorneys with no hope of reimbursement because it is not a prevailing party, and it has to pay Respondent's attorney fees despite failing on their primary claim.

It is a sad irony that the only "winners" in this protracted proceeding are the attorneys. Respondent was not successful; she received a final judgment that was thousands of dollars less than what Scandinavian was ready to pay more than four years ago. Scandinavian was not successful. By presenting a defense that resulted in a final judgment that was less than what it had offered, Scandinavian is forced to pay a fee award as if it had suffered an unqualified loss. Most importantly, the District Court's limited resources were wasted by a legal proceeding that could have ceased long before it did.

It stands to reason that: (1) a fee award should be reduced dramatically where the plaintiff prevails on only a secondary

claim fails to obtain any equitable relief, and receives a monetary judgment that is a fraction of what is demanded, to reflect this nearly complete lack of success; and/or (2) a defendant should not be liable for attorney fees incurred after a good faith settlement offer, made early in the litigation, is rejected where the plaintiff's eventual judgment is less than the offer due to the complete failure of a plaintiff's major claim.

I.

THE COURT OF APPEALS' UNEXPLAINED AFFIRMANCE OF RESPONDENT'S AWARD OF ATTORNEY FEES UNDERMINES TITLE VII BY SUBSIDIZING PLAINTIFFS WHO REJECT SETTLEMENT OFFERS TO PURSUE LONG-SHOT CLAIMS.

A. The Court of Appeals' Decision Rewards Respondent for the Failure of Her Primary Claim.

"[T]he extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees. . . ." *Hensley*, 461 U.S. at 440. Only when a court rejects "alternative legal grounds for a desired outcome" may a fee reduction be avoided. *Id.* at 435.

Although the District Court acknowledged this obligation, it paid only "lip service" to it by failing to reduce by one cent Respondent's requested fee award.[8] Such a refusal in light of

8. The District Court's was unwilling to reduce Respondent's requested fee award due to limited success because Respondent already had made such a reduction, but its view is refuted by the facts. The elimination of time for one attorney who attended, but did nothing during the trial (which accounted for one-third of the

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Respondent's dramatically limited success is an unreasonable application of Title VII.

1. Respondent's Primary and Secondary Claims Were Not Interrelated For Purposes of An Attorneys' Fees Award.

As *Hensley* teaches:

> Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee.

Hensley, 461 U.S. at 440. "[W]ork done on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved." *Id.* at 435 (quote omitted).

The District Court's conclusion that Respondent's demotion and constructive discharge claims were interrelated ignores several critical facts *found by the District Court*. To start, the District Court held that Respondent did not experience any sexual harassment or other discriminatory treatment after her demotion. *Liability Decision*, App. at 37. Moreover, Respondent then voluntarily transferred to another work site that was not supervised by any of the persons who harassed or discriminated against her. *Id.* Nor was she harassed or discriminated against by anyone else at the new site. *Id.* at 37-38. It was from that work site that she terminated her employment

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(Cont'd)

total voluntary reduction) obviously was for duplication of effort. Overall, Respondent's voluntary reduction for limited success was less than ten percent. The District Court's inaction, therefore, resulted in no meaningful reduction for limited success despite *Hensley*'s directive to the contrary.

with Scandinavian, despite being urged to stay, to work for a competitor at a higher rate of pay. *Id.* at 38. The working conditions at her last two work sites, therefore, were separate and distinct from those at the work site from which she was involuntarily transferred.

Because Respondent's demotion and constructive discharge claims are not "alternative legal grounds for a desired outcome," do not "involve a common core of facts," and are not "based on related legal theories," *id.* at 435, her failure to prevail on her constructive discharge claim mandated a substantial reduction in her requested fee award. A good starting point are the examples indicated above of specific activities that were related exclusively or primarily to her discharge claim. The District Court should have excluded those services from a fee award. Such a reduction should not have stopped there. Respondent's counsel should bear the consequences if it is difficult to identify other such services because they "should maintain billing records in a manner that will enable a reviewing court to identify distinct claims." *Id.* at 437. Failing that, the District Court should have taken the initiative and reduced the fee award.

2. *Even if Respondent's Primary and Secondary Claims Were Interrelated, the Court of Appeals' Decision Undermines Title VII by Rewarding Respondent's Counsel for Failure of Their Primary Claim.*

Even

> [w]here a lawsuit consists of related claims . . . where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Hensley, 461 U.S. at 439. "[T]he district court should focus on the significance of the overall relief obtained by the plaintiff in

relation to the hours reasonably expended on the litigation." *Id.* at 435.

> If a . . . plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount.

Id. at 436. In such instances, "[t]he district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Id.* at 436-37.

Characterizing claims as interrelated, therefore, does not shield against a fee reduction when the plaintiff's success on those claims is limited. A trial court's discretion on how to reduce the award (specific hours vs. across the board), however, "must be exercised in light of the considerations . . . identified" in *Hensley*. *Id.* at 437. It cannot abandon those responsibilities simply because the successful and unsuccessful claims are related.

But that is precisely what the District Court did. Respondent's success unquestionably was limited. She claims she was discharged; she lost. She wanted her old job back; she did not get it. She wanted $146,000 in back pay and $40,000 per year in front pay; she received less than $13,000. She wanted recovery against five defendants; she recovered only from one. Yet the District Court awarded her fees as if she had prevailed in full on all of her claims.

Instead, the District Court should have acted the same as courts have done in countless other instances and reduced substantially the requested fee award. *See, e.g., Carroll v. Blinken*, 105 F.3d 79 (2d Cir. 1997) (fee award reduced by

95% because plaintiffs prevailed on minor issue and failed on more significant claim); *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir.) (plaintiff "entitled to only a fraction of her attorney's fees" due to failure on most consequential claims), *cert. denied*, __ U.S. __, 117 S. Ct. 584 (1996); *Corder v. Brown*, 25 F.3d 833, 836 (9th Cir. 1994) (district court award of full fees vacated when plaintiffs received $24,000 damage award after demanding $2-million because plaintiffs obtained "only a small fraction of what they originally sought"); *Popham v. City of Kennesaw*, 820 F.2d 1570, 1578-82 (11th Cir. 1987) (fee award reduced by two-thirds when plaintiff received damages of $30,000 after demanding $2-million); *Myree v. Local 41, IBEW*, 847 F. Supp. 1059 (W.D. N.Y.) (plaintiff received $25,000 damage award after seeking more than $200,000 in back pay; court reduced by 75% all time attributable to issue of damages), *aff'd mem.*, 29 F.3d 620 (2d Cir. 1994); *Lawrence v. Western Pipe Service*, 146 F.R.D. 195 (N.D. Ala. 1993) (fee award reduced by 90% when plaintiff received $350 judgment instead of more than $30,000 demanded), *aff'd mem.*, 19 F.3d 1445 (11th Cir. 1994). Its failure to do so in defiance of this Court's directives constitutes an abuse of discretion and is clearly not "reasonable" within the meaning of § 706(k) of Title VII.

Respondent's counsel has already acted as if such a reduction were warranted. They made a reduction, albeit inadequate, for time spent on the post-trial Findings of Fact and Conclusions of Law even though work performed on unsuccessful claims was interrelated with the successful ones. By the same logic Respondent's should have extended those reductions to the vast amount of time devoted to discovery, trial preparation, the drafting of pre-trial Findings of Fact and Conclusions of Law, the trial, and closing arguments.

B. By Rewarding Respondent's Counsel for Rejecting Settlement Offers for More Than the Value of Their Only Viable (But Secondary) Claim to Pursue a Long Shot, the Court of Appeals' Decision Undermines *Farrar* and Promotes Vexatious Litigation.

When a plaintiff rejects a settlement offer that exceeds the value of her only viable (but small value) claim to pursue a long-shot claim that fails, it offends Title VII and this Court's precedent for plaintiff's counsel to be rewarded when the result is a judgment that is less than the offer. Under *Farrar*, *supra*, the plaintiff does not qualify as a "prevailing party" for all purposes relevant to attorneys' fees awards under Title VII. The final judgment did not "modify the defendant's behavior," as is required for a prevailing plaintiff, *see Farrar*, 506 U.S. at 111-12, because Scandinavian already was willing to pay Respondent a sum that was greater than the judgment.

It offends the principles espoused by this Court in *Farrar* that Respondent's counsel was rewarded fees for any services performed after the offer was rejected. "*Farrar* was designed to prevent a situation in which a client receives a pyrrhic victory and the lawyers take a pot of gold." *Sheppard*, 88 F.3d at 1339.

Even though Respondent was a prevailing party on her secondary claims, *Farrar* teaches that "the 'technical' nature of a . . . judgment . . . does not bear on the propriety of fees awarded. . . ." *Id.* at 114. A court "may lawfully award fees or no fees without reciting the twelve factors bearing on reasonableness, or multiplying the number of hours expended by a reasonable hourly rate." *Id.* at 115 (citations and quotes omitted). A complete denial is appropriate where

> the relevant indicia of success — the extent of relief, the significance of the legal issue on which the

> plaintiff prevailed, and the public purpose served — all point to a single conclusion: . . . only a de minimis victory.

Id. at 122 (O'Connor, J., concurring). To be specific: (1) "A substantial difference between the judgment received and the recovery sought suggests that the victory is in fact purely technical"; (2) "If recovering one dollar from the least culpable defendant and nothing from the rest legitimately can be labeled a victory . . . surely it is a hollow one"; and (3) "Success might be considered material if it also accomplished some public goal other than occupying the time and energy of counsel, court, and client." *Id.* at 121-22 (O'Connor, J., concurring).

Once Respondent rejected the November 1993 settlement offer, she was no different than the plaintiff in *Farrar*. She "asked for a bundle and got [less than] a pittance." *Id.* at 120 (O'Connor, J., concurring). Her discharge claim failed because her departure was voluntary; consequently, her demand for equitable relief (*i.e.*, reinstatement) was denied. She demanded tens of thousand of dollars more than what Scandinavian had offered, and she received thousands less, and from only one of the five defendants she sued. Indeed, given that the $17,500 settlement offer more than covered the demotion claim, the remainder of the case fairly can be characterized as a failure to prevail on the discharge claim that would have netted a larger judgment. Finally, any public purpose served by the judgment because the award was less than the settlement offer, was of less consequence than had Respondent accepted the settlement offer. *See Simpson v. Sheahan*, 104 F.3d 998, 1002 (7th Cir. 1997). Thus, Respondent should be treated the same as the plaintiff in *Farrar* from November 1993 onward.

Nor should this just result by affected simply because Scandinavian's settlement offer was not couched as a Rule 68

offer of judgment, as Respondent undoubtedly will maintain. This requirement, articulated in *Chesny*, should be revisited for several reasons.

Rule 68 does not require an offer of judgment to reduce a plaintiff's attorney fees. Rule 68 actually requires a plaintiff to pay the defendant's costs, a far more harsh penalty. The language does not provide for the milder penalty of a reduction of the plaintiff's fees. Given the harshness of the articulated result to the plaintiff, the defendant should correspondingly be required to offer to take an adverse judgment before obtaining that sanction.

A civil rights defendant, however, does not receive such benefits when an offer of judgment is made. Lower courts repeatedly have denied fees to civil rights defendants if the plaintiff's judgment is less than the offer,[9] and this Court has held that the Rule 68 sanctions are not applicable if the defendant prevails. *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981). A civil rights defendant, however, still must suffer a judgement against it to reduce the plaintiff's fees, a judgment that could be used against it in other proceedings. A civil rights defendant should not have to choose between offering to take a judgment just to limit the plaintiff's fees or pay those fees in full even when the eventual judgment is less than the offer.

In addition, the focus upon Rule 68 in *Marek* was misplaced. The defendant had raised two contentions before the lower

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9. *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1120 (8th Cir. 1989); *Crossman v. Marcoccio*, 806 F.2d 329, 333-34 (1st Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987); *Denny v. Hinton*, 131 F.R.D. 659, 665 (M.D. N.C. 1990), *aff'd mem.*, 937 F.2d 602 (4th Cir. 1991); *Adams v. Wolff*, 110 F.R.D. 291, 293-94 (D. Nev. 1986); *Chesny v. Marek*, 547 F. Supp. 542, 547-48 (N.D. Ill. 1982); *Waters v. Heublein, Inc.*, 485 F. Supp. 110, 117 (N.D. Cal. 197[illegible].

courts: the reduction of the plaintiff's fees and a recovery of its own fees. The lower courts denied both claims, but the defendant did not appeal the denial of its own fees. The significance and necessity of an offer of judgment should have ceased once the defendant relinquished its own fee demand.

Finally, whether the defendant makes a settlement offer or an offer of judgment is a difference without a distinction. The goal cited in *Chesny* to encourage settlements is just as applicable when, as here, a settlement offer, rather than an offer of judgment is made.

Respondent's counsel easily could have remedied its concern that Scandinavian's settlement offer did not cover its attorney fees. They either could have proposed that the fee issue be left open for the District Court to decide whether Respondent was the prevailing party. *See Maher v. Gagne*, 448 U.S. 122, 129-30 (1980). They declined, and their silence has been rewarded.

This Court's prior rulings provide the basis, and the present case provides the opportunity, to address the abuses in civil rights litigation where lawsuits are generated by a fight over attorney fees. Respondent should be denied recovery of attorney fees after she rejected Scandinavian's November 1993 or January 1994 settlement offers.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED OCTOBER 6, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-5228

D.C. Docket No. 92-1702-CIV-MARCUS

ANDREA FRANKLIN,

Plaintiff-Appellee,

versus

BALLY MANUFACTURING CORPORATION, a Delaware Corporation, SCANDINAVIAN HEALTH SPA, INC., an Ohio Corporation,

Defendants-Appellants,

MARK SEAMAN, MICHAEL PALUMBO, EUGENE PALUMBO, ETC.,

Defendants.

No. 96-5367

D.C. Docket No. 92-1702-CIV-SM

ANDREA FRANKLIN,

Plaintiff-Appellee,

Appendix A

versus

BALLY MANUFACTURING CORPORATION, a Delaware Corporation, SCANDINAVIAN HEALTH SPA, INC., an Ohio Corporation,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

(October 6, 1997)

Before CARNES, Circuit Judge, KRAVITCH and REAVLEY*, Senior Circuit Judges.

PER CURIAM:

None of appellant's contentions warrant discussion, except one. Pointing to paragraphs nos. 21-22 of the district court's findings of fact and conclusions of law, appellant contends that the district court erred in considering as evidence of a hostile sexual environment statements and conduct about which appellee had no knowledge. *Faragher v. City of Boca Raton,* 76 F.3d 1155, 1162 (11th Cir. 1996), *aff'd,* 111 F.3d 1530 (1977) (en banc) (without relevant discussion), held that "an employee's conditions of employment cannot be altered by conduct of which she is unaware," and "cannot contribute to her subjective view of the work environment as hostile." We did hold, however, that such evidence "may be relevant to the extent that it corroborates her allegations." 76 F.3d at 1162 n.5.

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* Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Appendix A

Of course, the district court did not have the benefit of *Faragher* when it decided this case. However, even assuming that the district court considered evidence of conduct and statements of which appellee was unaware as substantive evidence instead of merely as corroboration of appellee's own testimony, any such error was harmless in view of all the other evidence. As we held in *Faragher,* 76 F.3d at 1162, "[w]e have no doubt that the district court would have found that [the plaintiff's] work environment was abusive, both objectively and subjectively, based solely on conduct of which [she] was aware."

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED OCTOBER 9, 1996

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-1702-CIV-MARCUS
Magistrate Judge Bandstra

ANDREA FRANKLIN,

Plaintiff

v.

BALLY MANUFACTURING CORP., et al.,

Defendants.

ORDER

THIS CAUSE comes before the Court upon Plaintiff's Motion for an Award of Attorney's Fees and Reimbursement of Costs and Litigation Expenses, initially filed September 26, 1995. Plaintiff also filed supporting memorandum, affidavits and appendices, the Defendants filed a detailed Memorandum in Opposition on October 25, 1995, and Plaintiff replied.

This Court referred the Motion to Magistrate Judge Bandstra, who filed a Report and Recommendation in support of Plaintiff's Motion on February 21, 1996, specifically recommending: (1) that Plaintiff's request for attorney's fees be granted in the amount of $168,978.50; (2) that Plaintiff's request for reimbursement of costs and expenses be granted in the

amount of $11,373.99; and (3) that Plaintiff be awarded post-judgment interest, at the prevailing rate, from August 30, 1995, on any attorney's fees and costs ultimately awarded in the case.

Thereafter, Defendants filed written objections to the Report and Recommendation and the Plaintiff responded. Having presided over the trial and having considered all of the relevant pleadings, documents, and affidavits, *de novo*, and being otherwise fully advised in the premises, this Court concludes that the Magistrate Judge's Report and Recommendation should be adopted and the Plaintiff's Motion GRANTED.

The central contention raised by Defendants is that the "lodestar" figure should be adjusted downward because Plaintiff succeeded only on certain claims and was awarded only a portion of her requested damages. As the Magistrate Judge noted, and, indeed, as this Court observed in the course of the bench trial, operative facts relevant to several of the claims were plainly intertwined and overlapping. Defendants' suggestion that the Court should attempt to dissect the interlocking pieces of evidence is unavailing here. We are satisfied that the fee calculus has excluded the excessive, redundant and otherwise unnecessary. Plaintiff's claims were based on a central core of facts. She successfully litigated whether a sexually hostile work environment existed and she successfully proved that she was discriminately demoted. Under the particular facts and circumstances of this case, we are convinced that this "lodestar" fee is both fair and reasonable. The labor of Plaintiff's counsel ultimately resulted in successfully proving much of the core facts of the case, secured a personal damage award, and vindicated a clear congressional policy against discriminatory work practices. Accordingly, it is

Appendix B

ORDERED AND ADJUDGED that

1) Plaintiff's request for attorney's fees is GRANTED in the amount of $168,978.50;

2) Plaintiff's request for reimbursement of costs and expenses is GRANTED in the amount of $11,373.99; and

3) Plaintiff is awarded post-judgment interest, at the prevailing rate, from August 30, 1995, on attorney's fees and costs awarded in the case.

DONE AND ORDERED at Miami, Florida, this 9th day of October, 1996.

s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Magistrate Judge Bandstra
Mark Zelek, Esq.
Thomas H. Barnard, Esq.
Scott J. Jontif, Esq.
Robert E. Weisberg, Esq.

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED FEBRUARY 21, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-1702-CIV-MARCUS

ANDREA FRANKLIN,

Plaintiff,

vs.

BALLY MANUFACTURING CORPORATION, et al.,

Defendants.

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Plaintiff's Motion for an Award of Attorney's Fees and Reimbursement of Costs and Litigation Expenses filed on September 26, 1995. On January 18, 1996, this motion was referred to the undersigned by the Honorable Stanley Marcus for a Report and Recommendation pursuant to 28 U.S.C. § 636(b). Upon review of this motion, defendants' opposition thereto, the Court file and applicable law, the undersigned recommends that plaintiff's motion be GRANTED as provided below.

Appendix C

INTRODUCTION

On July 22, 1992, plaintiff, Andrew Franklin, filed this action against defendants, Bally Manufacturing Corporation and Scandinavian Health Spas, Inc., alleging discrimination on the basis of sex, sexual harrassment, and constructive discharge in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Florida Human Rights Act, Fla. Stat. § § 760.10 *et seq.* Plaintiff also named certain individuals as additional defendants in her complaint and asserted various state law claims. The individual defendants and state law claims were voluntarily dismissed by plaintiff early on in the litigation.

Following a period of discovery, the case proceeded to a bench trial, between February 13, 1995 and February 17, 1995, resulting in the issuance of Findings of Fact and Conclusions of Law, dated August 30, 1995, in which the Court found Scandinavian Health Spas liable for sexual harrassment and for discriminatorily demoting plaintiff from one position to another. The Court further found that Bally Manufacturing did not constructively discharge plaintiff and, therefore, limited plaintiff's damages to $ 12,229.65.

On September 26, 1995, plaintiff filed the instant motion for attorney's fees, costs and litigation expenses. In this motion, plaintiff seeks $170,838.50 in attorney's fees, including those incurred in conjunction with this motion, and $11,375.39 in costs and expenses. In support thereof, plaintiff summits the affidavits of her attorneys attesting to the accuracy of their detailed billing records, the affidavit and billing records of a paralegal who worked on the case, and a summary of costs and litigation expenses incurred in the case.

Appendix C

Defendants object to plaintiff's motion arguing, in summary, that the hours expended by plaintiff's legal staff were excessive, redundant and unreasonable. In addition, defendants argue that the hourly rates charged by plaintiff's attorneys are excessive and unsupported. Defendants particularly complain about plaintiff's request for attorney's fees in an amount in excess of $180,000 when plaintiff recovered just over $12,000 in the case. Defendants also object to plaintiff's attempt to recover fees for attorney hours expended on unsuccessful claims including plaintiff's constructive discharge claim. Consequently, defendants request that this Court dismiss plaintiff's fee request in toto or, in the alternative, award fees reduced to a reasonable level.

ANALYSIS

A. *Attorney's Fees*

Pursuant to the Court's Findings of Fact and Conclusions of Law, plaintiff, as the prevailing party in this Title VII action, is entitled to recover reasonable attorney's fees pursuant to 42 U.S.C. § 2000e-5(b). In this circuit, the determination of a reasonable attorney's fee begins by determining the "lodestar," a number calculated by multiplying hours reasonably expended by counsel by a reasonable hourly rate. *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1299 (11th Cir. 1988) (citing *Hensley v. Eckerhart*, 421 U.S. 424, 433 (1983)). Generally, a district court has "great latitude in formulating attorney's fee awards" subject only to the necessity of explaining its reasoning to allow for appellate review. *McKenzie v. Cooper, Levins & Pastko, Inc.*, 990 F.2d 1183, 1184 (11th Cir. 1993) (quoting *Gilmere v. City of Atlanta*, 931 F.2d 811, 814 (11th Cir. 1991)).

Appendix C

Here, plaintiff calculates a suggested loadstar of $170,838.50[1] by multiplying the hours expended by her four attorneys working on the case by their hourly billing rates ranging from $150.00 to $250.00. Plaintiff supports her loadstar calculation with the detailed billing records of each attorney which provide a brief description of the work performed by each attorney and the time expended on the various tasks on particular dates. Plaintiff also seeks paralegal expenses, in the amount of $8,911.11 (included in her loadstar calculation), which are also supported by the affidavit and billing records of the paralegal working on the case.

Defendants raise several objections to the suggested loadstar challenging both the reasonableness of the hours expended by plaintiff's legal staff and their hourly billing rates. Defendants begin their challenge noting plaintiff's "limited success" at trial on only certain claims in her complaint and her recovery of "only" $12,229.65 in damages. Defendants argue that plaintiff cannot possibly justify as reasonable her request for attorney's fee in an amount over $180,000 when she succeeded on only some of her claims and not on her claim for constructive discharge. From this premise, defendants argue that the hours plaintiff's legal staff claim to have expended on successful claims

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1. Plaintiff's suggested loadstar includes $6,050.00 sought for attorney's fees incurred in conjunction with litigating the attorney's fees issue. Plaintiff notes the general rule recognized in this circuit that time expended litigating attorney's fees is fully compensable. *See e.g. Martin v. University of South Alabama*, 911 F.2d 604, 610 (11th Cir. 1990); *Johnson v. University College of University of Alabama in Birmingham*, 706 F.2d 1205, 1207 (11th Cir. 1983). Defendants make no specific objection to plaintiff's request for attorneys fees resulting from this particular motion except as addressed above.

are excessive, redundant and unreasonable, citing numerous examples of excessive fees from the billing records of plaintiff's attorneys.

The first issue raised by defendants is whether the loadstar figure should be adjusted downward because plaintiff succeeded on only certain claims and was awarded only a portion of her requested damages. This issue has been repeatedly addressed by the Supreme Court and the Eleventh Circuit Court of Appeals in recent years. In the landmark case of *Hensley v. Eckerhart, supra,* the Supreme Court announced the following result oriented standard:

> We hold that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised.

Hensley, 461 U.S. at 440.

Hensley teaches that a critical factor in determining appropriate attorney's fees is the degree of success obtained in the case. *William v. Roberts,* 904 F.2d 634, 640 (11th Cir. 1990). Thus, the district court, when reviewing an attorney's fees motion, should consider the relationship of the claims that

resulted in the judgment with the claims that were rejected and the contribution, if any, made to plaintiff's success of the investigation and prosecution of the entire case. *Id.* Importantly, where operative facts relevant to the several claims are overlapping and intertwined, the court need not attempt to dissect the interlocking evidence and consider it in isolation as supporting only one claim or the other. *Id.* Finally, the court need not lower an attorney's fee award simply because a successful Title VII plaintiff did not receive the full amount of damages sought in the case. *Id.* (citing *City of Riverside v. Rivera*, 477 U.S. 561, 106 S. Ct. 2686 (1986) (as a rule, attorney's fees in civil rights cases should not be lowered to a porportion of the damages awarded).

Reviewing plaintiff's billing records and the court file, the undersigned finds that plaintiff has made a reasonable and good faith attempt to seek attorney's fees for only those hours expended by her attorneys on her successful claims of sexual harrassment and discriminatory transfer/demotion while attempting to exclude those hours directed solely to unsuccessful claims. Defendants estimate that plaintiff excludes only about 100 attorney hours (of approximately 980 expended by plaintiff's legal staff), and plaintiff does not challenge this estimate. While a 10% reduction of time may seem insignificant to defendants, the undersigned does not find it "inconceivable" that only 10% of plaintiff's attorney time was expended solely on unsuccessful claims. Stated otherwise, the undersigned finds no reason to question plaintiff's estimate that 90% of her attorney's time was spent developing facts that were overlapping and interwined with both successful and unsuccessful claims.

Finding no reason to reduce the requested lodestar based on plaintiff's "limited" success at trial, the undersigned next

examines plaintiff's billing records to determine whether any hours expended by plaintiff's legal staff were excessive, redundant, or unreasonable. To a large extent, defendants argue for such a finding based on the fact that plaintiff's law firm had four attorneys working on the case, sharing certain responsibilities, and carrying pretrial discovery and trial responsibilities at different times in the case. The undersigned finds no inherent problem in plaintiff staffing her case in this manner. As noted above, each attorney working on the case submitted his or her own affidavit and billing records which document the work responsibilities of each attorney and the time spent on particular tasks. The undersigned does not find that any of the tasks performed were unnecessary to the preparation or trial of this case or that plaintiff's attorneys merely duplicated each other's work resulting in excessive fees. Thus, the undersigned rejects defendants' contention that plaintiff's attorneys "milked" the case to increase their fees.

Defendants also note several "examples" of "inappropriate charges" in support of their position. Reviewing those examples, the undersigned finds no obvious instances of excessive billing associated with the depositions, written discovery, or any other work in the case. While the requested fee appears high, it does not seem excessive due to the numerous depositions completed prior to trial, the numerous issues which went to trial, and the degree to which defendants defended the case. Plaintiffs, in their reply memorandum agree to delete 12.4 hours of attorney time as hours inadvertently included in the fee request. Apart from those hours, the undersigned finds no reason to recommend a further reduction of the requested lodestar due to any excessive or unreasonable billing by plaintiff's attorneys.

Finally, the undersigned finds that the hourly billing rates charged by plaintiff's attorneys are reasonable for attorneys of

their skill and experience in this type of litigation. Three of plaintiff's four attorneys billed at the hourly rate of $150.00. Only Robert E. Weisbergk, Esquire, billed at $250.00 per hour. Based on this Court's experience and knowledge of attorney rates typically charged for this type of litigation by attorneys of similar experience and skill, the undersigned finds these rates are reasonable for this particular case.

B. *Costs and Expenses*

Plaintiff also seeks to recover $11,373.99 in costs and expenses incurred in the case. Reviewing plaintiff's summary of such expenses, it appears that the largest expense, was for court reporter costs for transcripts and attendance fees ($5,942.55) with the remainder of the expenses composed mostly of photocopying, mailing, and other recoverable expenses. Defendants raise no objection whatsoever to any of the requested costs or expenses. Accordingly, the undersigned recommends a reimbursement of costs and expenses in the requested amount of $11,373.99.

C. *Post-Judgment Interest*

Finally, plaintiff seeks post-judgment interest on attorney's fees and costs ultimately awarded in the case from August 30, 1995, the date of the Court's issuance of it's Findings of Fact and Conclusions of Law. Plaintiff cites authority in support of its request for interest on fees although not from this circuit. *See e.g. Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1988) (interest awarded on fees from date of original judgment); *Finkelstein v. Bergna*, 804 F. Supp. 1235, 1240 (N.D. Cal. 1992). Once again, defendants raise no objection to this aspect of plaintiff's motion.

Accordingly, the undersigned recommends that the Court award post-judgment interest, at the prevailing rate, on any attorney's fees and costs ultimately awarded by the Court from August 30, 1995.

SUMMARY

For all of the foregoing reasons, the undersigned recommends:

(a) that plaintiff's request for attorney's fees be **GRANTED** in the amount of $168,978.50;

(b) that plaintiff's request for reimbursement of costs and expenses be **GRANTED** in the amount of $11,373.99; and

(c) that plaintiff be awarded post-judgment interest, at the prevailing rate, from August 30, 1995, on any attorney's fees and costs ultimately awarded in the case.

The parties may serve and file written objections to this Report and Recommendation with the Honorable Stanley Marcus, United States District Judge, within ten (10) days of the receipt. *See* 28 U.S.C. § 636(b)(1)(C); *United States v. Warren*, 687 F.2d 347 (11th Cir. 1982), *cert. denied*, 460 U.S. 1087 (1983); *Hardin v. Wainwright*, 678 F.2d 589 (5th Cir. Unit B 1982); *see also Thomas v. Arn.*, 474 U.S. 140 (1985).

Appendix C

RESPECTFULLY SUBMITTED at Miami, Florida this 21st day of February, 1996.

s/ Ted E. Bandstra
Ted E. Bandstra
United States Magistrate Judge

Copies furnished to:

Hon. Stanley Marcus
All counsel of record

APPENDIX D — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED OCTOBER 16, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 92-1702-CIV-MARCUS

ANDREA FRANKLIN,

Plaintiff,

vs.

BALLY MANUFACTURING CORPORATION, a Delaware corporation, and SCANDINAVIAN HEALTH SPA, INC., an Ohio corp.,

Defendant.

FINAL JUDGMENT

THIS ACTION came for trial before the Court, Honorable Stanley Marcus, District Judge, presiding and the issues having been duly tried and the Court having entered its Findings of Fact and Conclusions of Law, it is hereby

ORDERED AND ADJUDGED, that judgment is hereby entered in favor of Defendant, BALLY MANUFACTURING CORP., and against Plaintiff, ANDREA FRANKLIN, with respect to her claims against BALLY MANUFACTURING CORP. If is further

ORDERED AND ADJUDGED, that the Plaintiff, ANDREA FRANKLIN, recover from Defendant,

Appendix D

SCANDINAVIAN HEALTH SPA, INC., the sum of fourteen thousand eight hundred forty six dollars and twenty one cents ($14,846.21) which includes damages in the amount of twelve thousand two hundred twenty nine dollars and sixty five cents ($12,229.65) and prejudgment interest in the amount of two thousand six hundred sixteen dollars and fifty six cents ($2,616.56). Plaintiff shall also recover post judgment interest at the rate allowed by law. It is further,

ORDERED AND ADJUDGED that Plaintiff, ANDREA FRANKLIN, as a prevailing party in a Title VII action, is also entitled to recover reasonable attorneys' fees pursuant to 42 U.S.C. §2000e-5(k), as well as her costs. The Court will enter a separate Order on Plaintiff's attorneys' fees and costs.

DONE AND ORDERED in Chambers in Miami, Dade County, Florida this 16th day of October, 1995.

s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

APPENDIX E — FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED AUGUST 30, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-1702-CIV-MARCUS

ANDREA FRANKLIN,

Plaintiff,

v.

BALLY MANUFACTURING CORPORATION, a Delaware corporation licensed to do business in Florida, and SCANDINAVIAN HEALTH SPA, INC., an Ohio Corporation licensed to do business in Florida,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE was tried without a jury before the Court on February 13-15, 1995, and closing arguments were heard on May 16, 1995. In this action, Plaintiff Andrea Franklin sues her former employer for violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and Florida Statutes Chapter 760. Specifically, Count I of the Plaintiff's complaint alleges that she was discriminated against when she was demoted and constructively discharged on the basis of her gender, in violation of Title VII. In Count II, Plaintiff claims that she was subjected to a sexually hostile and offensive

work environment, also in violation of Title VII. Count III, claiming intentional infliction of emotional distress, was voluntarily dismissed by the Plaintiff on February 23, 1993. Count IV alleges that the same discriminatory conduct against the Plaintiff was in violation of Chapter 760 of the Florida Statutes.

Jurisdiction is vested in this Court by 42 U.S.C. § 2000e 5(f) (3) and 28 U.S.C. §§ 1331 and 1367, and pursuant to Fed. R. Civ. P. 52(a), the Court makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. The parties have stipulated that:

A. Plaintiff was an employee of Defendant Scandinavian Health Spa, Inc. ("Scandinavian").

B. Defendant Scandinavian owns and operates eleven clubs in Dade, Broward and Palm Beach Counties, among others in other states in the United States.

C. Defendant Scandinavian is a wholly-owned subsidiary of Defendant Bally Manufacturing Corp. ("Bally").

D. Defendants Scandinavian and Bally are employers under Title VII who are engaged in interstate commerce and each of them employs twenty or more employees.

2. The Plaintiff filed an administrative charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") (EEOC Charge No. 150-91-2900) on

or about August 8, 1991. The EEOC issued a Notice of Right to Sue, which was received by the Plaintiff within ninety days before July 22, 1992. The Plaintiff has met all conditions precedent to the filing of this action.

3. The eleven health clubs operated by Scandinavian in South Florida were known as: Davie, Courtrooms, Waterways, Kendall I, Kendall II, North Miami, Pompano, Coral Gables, Boca Raton, West Palm, and Palm Beach. The Kendall I, Pompano, and North Miami locations were known as "non-executive" clubs, while the remaining eight were classified as "executive" clubs. The distinctions between executive and non-executive clubs were the size of the facility and the amenities. The executive clubs were larger and held amenities not offered by the non-executive clubs, which included, for example, one or more of the following: tennis courts, racquetball courts, a larger swimming pool, more exercise classes, a tanning room, and a running track.

4. Membership sales were the primary revenue source for Scandinavian's South Florida clubs. Employees sold memberships in different packages and for different lengths of time. At all relevant times, however, the majority of membership options in the South Florida clubs permitted the member to use any of Scandinavian's clubs, whether executive or non-executive. Salespeople in non-executive clubs could sell both the same membership packages as sold in executive clubs, as well as being able to offer less expensive memberships when the sale was made at a non-executive club.

5. Before March 11, 1991, all eleven South Florida clubs had the same sales and management structure. Each club had two sales teams, known as divisions. The divisions were

comprised of an equal number of Program Directors — the entry level sales position at Scandinavian. The division might also include one or two Staff Managers, also known as Future Managers. The entire division was run by the Division Manager (or "DM"), and the two Division Managers reported to a single club General Manager (or "GM").

6. Program Directors were responsible primarily for selling club memberships, and their compensation was based on sales commissions. Staff Managers, like Program Directors, were primarily concerned with selling memberships, but they also oversaw the sales efforts of a few Program Directors as well. Division Managers were responsible for generating both their own personal sales and for coordinating and maximizing the sales efforts of the Program Directors and Staff Managers on their teams. The DMs assisted with sales efforts, helped close deals, and coached and pressured Program Directors to ensure high levels of sales. Division Managers' compensation was primarily based on their own sales results, but they were also able to earn "overrides" depending on how well their team performed relative to the team's sales quota.

7. The monthly sales quotas for the South Florida clubs were set by Scandinavian according to the sales expectations for the club. Non-executive clubs generally had smaller sales quotas and smaller sales staffs than executive clubs. Each salesperson had an individual sales quota, computed as some portion of the club's overall sales quota. Each Divisional Manager also had a sales quota for his or her staff that equalled half of the club's overall sales quota.

8. Selling memberships at a non-executive club was more difficult than at an executive club because the smaller size and

fewer amenities drew less traffic into the club, resulted in a smaller member base, and made selling a membership more difficult. A Divisional Manager at a non-executive club could generally be expected to earn less than a Divisional Manager at an executive club because of the lower overall membership sales rate at those facilities. This difference was offset to some degree, however, because non-executive clubs had lower sales quotas, making it easier to obtain override compensation. In a few instances, an individual DM at a non-executive club did earn more in a single month than an individual DM at an executive club.

9. Prior to March of 1991, each club had a single General Manager, the highest management position at any one facility. The GM was responsible for the day-to-day operation of the club, as well as its overall sales performance. The GM was not personally responsible for selling memberships, and the GM's compensation was based entirely on salary and overrides.

10. As nearly every present and former Scandinavian salesperson or manager to testify made clear, Scandinavian employees worked in a potentially lucrative, but high pressure, competitive sales environment. Employees were consistently expected to sell large numbers of memberships and were always in competition with one another for promotional opportunities and even for maintenance of their own positions. Salespeople and managers were commonly transferred from one position to another, either within or among clubs. These transfers often involved demotions and promotions between levels of management and sales positions, as well as lateral transfers to more or less desirable clubs. Nearly every former or present Scandinavian employee having achieved a position beyond Program Director who testified at trial had a work history replete

with transfers, promotions, and demotions. Both male and female employees experienced this shuffling of positions.

11. During 1990, the eleven South Florida Scandinavian clubs were under the direction of Jeff Stockstill. In addition, in December of 1989, Mark Seaman was promoted to a position called Area Manager. In that capacity, Seaman supervised first three, and later four clubs, and reported to Jeff Stockstill, who supervised the remaining South Florida clubs directly. The clubs under Seaman's management were Kendall I, Kendall II, and Coral Gables. The Davie club was later added as a fourth facility under Seaman's direction.

12. Andrea Franklin was introduced to the Scandinavian clubs in late 1988 or early 1989, when she was an employee of another club owned by Bally in St. Louis, Missouri. During a vacation in South Florida, Franklin went to the Waterways club to exercise. As a manager of another club owned by Bally, she was permitted to use any of the Bally-owned facilities in the country. Mark Seaman was the manager at the Waterways club at that time. Seaman discussed the earnings potential at the South Florida Scandinavian clubs with Franklin, and encouraged her to come to work for him. Seaman explained, however, that Franklin would have to start at the bottom and work her way up. Seaman then gave the Plaintiff the name of one of the Divisional Managers at Waterways, Joe Picone, and told Franklin to contact Picone if she were interested in pursuing a position. Franklin did contact Picone, made arrangements to move to Florida, and began working at the Waterways club in May of 1989 as a Program Director.

13. Shortly before the Plaintiff joined the sales team at Waterways, Seaman also hired Dave Widstrand, who had previously been a manager of other health clubs in the Chicago

area, as a Future Manager/Staff Manager in the Waterways club. In August of 1989, Franklin was promoted to the Staff Manager position.

14. In September of 1989, Franklin was promoted to the position of Divisional Manager at the Kendall II facility, under then General Manager Ron Wilcox. Franklin took over this position in October of 1989. The other Divisional Manager position at Kendall II remained unoccupied until mid-December of 1989.

15. Stuart Dansby replaced Wilcox as General Manager at Kendall II in early December of 1989. Also in December of 1989, Seaman was promoted to the position of Area Manager, with direct supervision of the Kendall I, Kendall II, and Coral Gables clubs. At about the same time, Jeff Stockstill became the Area Director for all eleven South Florida Scandinavian clubs.

17. Seaman's office during this time was located in the Coral Gables club, and he spent the majority of his time at that facility. His contact with the Kendall II club included calling the club daily and visiting the club approximately once a week.

18. Also in December of 1989, Jim Willin was moved from his position as General Manager at the Kendall I club to the open Divisional Manager position at Kendall II, opposite Franklin. Franklin worked the "A team" which covered Monday, Wednesday, Friday, and alternating Sundays. Willin's "B team" worked Tuesday, Thursday, Saturday, and alternating Sundays.

19. A typical work day on Franklin's Monday-Wednesday-Friday and alternating Sunday schedule ran from 10 or 11 in the morning until 10 or 11 at night. In addition, on Tuesday,

Thursday, and Saturday, the "off days," salespeople were expected to report for "phone night." On phone night, the employee worked between two and four hours in the afternoon or early evening, setting up appointments for the next work day. Thus, in a typical month, Franklin and the other salespeople could expect to have two days entirely off from work.

20. The Kendall II club was performing poorly at this time. In September of 1989, for example, the club fulfilled only 65 percent of its $325,000.00 sales quota for the month. By January of 1990, however, the club reached 115 percent of its then $375,000.00 sales quota. The monthly sales performances of Franklin and Willin and their respective staffs for January through August of 1990 at Kendall II were as follows:[1]

—STAFF RESULTS—			—PERSONAL RESULTS—	
Month/DM	*Quota/Sales*	*%*	*Quota/Sales*	*%*
January	$187,500		$50,000	
Franklin	$225,138	120	$55,990	112
Willin	$205,658	110	$63,578	127
February	$187,500		$50,000	
Franklin	$183,059	98	$64,324	129
Willin	$143,319	76	$68,108	136
March	$187,500		$50,000	
Franklin	$216,563	116	$63,438	127
Willin	$196,432	105	$62,811	126
April	$187,500		$50,000/ $42,000[2]	
Franklin	$194,011	103	$61,629	123
Willin	$193,597	103	$47,303	113

1. Defs.' Exh. 3, Composite Staff Results for the South Florida Clubs for 1990.

2. In April of 1990, Willin's personal quota was $42,000, while Franklin's was $50,000.

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May	$187,500		$60,000	
Franklin	$210,150	112	$61,703	103
Willin	$213,762	114	$66,813	111
June	$187,500		$60,000	
Franklin	$215,231	115	$59,705	100
Willin	$214,442	114	$70,314	117
July	$187,500		$50,000	
Franklin	$242,110	129	$56,689	113
Willin	$234,558	125	$65,031	130
August	$187,500		$50,000	
Franklin	$252,331	135	$58,211	116
Willin	$260,733	139	$58,694	117

Thus, the two Divisional Managers at the Kendall II club performed comparably for the period between January and August of 1990.

A. Claim of Sexual Discrimination Based upon a Sexually Hostile and Offensive Work Environment

21. Despite the Plaintiff's accomplishments in her tenure with the Scandinavian clubs, Mark Seaman and Stuart Dansby subjected the Plaintiff to a continuous pattern of harassment based upon her gender. The oppressive working conditions and acts of sexual discrimination and harassment she suffered while working at Kendall II between January and October of 1990 included:

a. At periodic group meetings and in the club, Plaintiff Franklin was referred to in a sexually derogatory and degrading manner. Both Dansby and Seaman regularly referred to Franklin as the "DM with tits." This epithet was applied to Franklin both when Dansby and Seaman addressed her directly and as a means

of referring to her with others. Seaman and Dansby used the phrase "DM with tits" during conversations in front of club members, as well as the staff. Dansby admits having referred to Franklin in this manner. In addition, a number of former Scandinavian employees testified as to these derogatory comments. Gina Reyes testified that she heard both Dansby and Seaman call Franklin "DM with tits;" Ana Remond testified to having overheard Dansby on the telephone with Seaman on two separate occasions in which he referred to Franklin as a "DM with tits;" Cindy Watson testified to having heard Seaman use the term "DM with tits" in reference to the Plaintiff; and Ron Wilcox testified that Seaman used the phrase "DM with tits" on "a couple of occasions." (Wilcox Depos. at 53). Wilcox recalled in particular that at a meeting regarding Franklin's demotion to North Miami, Seaman stated that he was "sick and tired of DMs with tits." Plainly, the repeated use of this derogatory phrase undermined Plaintiff's authority with both her staff and club members and humiliated her.

22. Mark Seaman and Stuart Dansby subjected the Plaintiff to a series of derogatory remarks and an oppressive work environment. Cindy Watson[3] testified credibly that Dansby stated at a meeting at the Kendall II club that "you could fly a small jet engine into Andrea Franklin's crotch and not hit the sides." Watson also testified that Seaman had referred to Watson as a "dumb fucking cunt," that she must be a "great lay" to have attained her position with Scandinavian, and that the only reason she made as much money as she did was because she was "good on her back." In addition, Watson further recalled Seaman making certain generally derogatory comments about women

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3. Watson was the General Manager of the Coral Gables club, where Seaman had his office during 1990 and spent the majority of his time.

employees on a regular basis in 1990, including: that women don't have the "warrior mentality" that it takes to succeed, that a woman's place was at home, that women were not strong enough for promotion, and that women employees asked for too much time off.

Ron Wilcox testified that Seaman regularly expressed a dislike for women and that he often conveyed the idea that "on a management level, that women were not good enough to be general managers. . . ." Wilcox Depos. at 57. Wilcox also recalled Seaman "alluding to the fact that he preferred to have men as general managers, that they were more reliable, that they were more dependable, that he didn't have to worry about them, whether they're going to have their periods or not, whether they're going to be sick, whether they'd make it into work that day or not, whether they'd have complaints." *Id.* at 58-59.

Gina Reyes, a staff manager on Andrea Franklin's team at Kendall II, added that Dansby often made sexually derogatory comments about the women members of his staff at team meetings. In particular, Reyes recalled Dansby telling her to go out into the club with her "lead boxes" and get some leads, referring to her large breasts. These comments were made in Franklin's presence.

Ana Remond testified that while she was a Divisional Manager at the Coral Gables club, Mark Seaman made numerous derogatory comments about women generally. Seaman stated that women don't make good managers because they don't have the "warrior mentality," and that women should stay at home and cook. Remond also recalled having heard Seaman call Cindy Watson a "fucking dumb bitch" and telling Remond not to listen to Watson.

Finally, Plaintiff Franklin testified credibly that Seaman was often present when Dansby would call her the "DM with tits" but that he never reprimanded Dansby. Instead, Seaman laughed. Franklin complained to Dansby about both his own behavior and that of Seaman, but Dansby did nothing to correct the problem.

23. Seaman and Dansby treated Franklin differently from her male counterpart, Jim Willin, despite their nearly identical records of sales, both personally and for their staffs. Dansby and Seaman often screamed and yelled at Franklin, while Willin was spared this kind of treatment. In addition, Franklin received written warnings for conduct that Willin was never reprimanded for. Finally, after Willin had been out of the club for nearly a month for personal reasons, Franklin was not permitted to take even a one-week vacation. The increasing pressure that was heaped upon Franklin by Dansby, and at Seaman's direction, culminated in her demotion in October of 1990.

B. Claim of Sexual Discrimination in Demotion from Kendall II to North Miami Club

24. In September of 1990, Willin was absent for the majority of the month, first on bereavement leave, and later for medical reasons. While Willin was out of the club, the Plaintiff was required to cover Willin's responsibilities. Franklin worked every day in September without a single day off. Despite Willin's absence, and with Franklin's considerable efforts, the Kendall II club achieved 101 percent of its $400,000.00 quota in September of 1990. Defs.' Exh. 4 at 002682. The A-team sold 111 percent of its $200,000.00 quota, and the B-team 95 percent of its $200,000.00 quota. The Plaintiff herself reached sales of 116 percent of her personal quota in September, while Willin sold only 38 percent of his quota.

25. Stuart Dansby testified that it was Mark Seaman's decision that Franklin would have to make up for Willin's absence during the September period. Dansby specifically acknowledged that requiring her to take over Willin's staff in addition to her own was a lot to ask. However, Dansby did not relate these concerns to Seaman and instead continued to apply the pressure to Franklin at Seaman's direction.

26. The Plaintiff received six employee warning reports while she was a Divisional Manager at Kendall II. First, on June 20, 1990, Plaintiff was warned for not meeting requirements of $5000 of personal gross sales in a working day, having fifteen appointments scheduled for a working day, staying until the last sale is made and the last salesperson goes off duty, and staying until 8:30 p.m. on phone night. Next, on September 20, 1990, the Plaintiff was given three written warnings charging, respectively, that Plaintiff: (1) wrote a "phony turn back the hands of time contract;" (2) forged Stuart Dansby's signature on a contract; and (3) called in $4,000.00 of "non-existent gross." On October 17, 1990, Plaintiff was given two warnings, both for coming to work without fifteen appointments. The Plaintiff did not disagree in writing with any of these write-ups, despite there being a space on the form for the employee to respond to the charge. However, we credit Franklin's testimony that Dansby instructed her not to disagree if she wanted to keep her job. Jim Willin also testified that on one occasion when he was warned for an incident in 1989 which he did not believe was his fault, he was instructed not to disagree.

27. Other similarly situated employees generally were not given written warnings for the kinds of problems identified in the warnings given to the Plaintiff. Gina Reyes, a member of the A team, testified that she often worked out in the Kendall II

club on her phone nights after completing her work. Therefore, she was often present at the end of the B team's sales day. Reyes stated that Jim Willin did not always stay until the last salesperson on his team left for the night, but that his Staff Manager would sometimes stay and call in the daily numbers instead. Although Willin testified that he never left before the last salesperson, we find Reyes's testimony on this point credible, as she has no apparent bias and clearly recalled the circumstances surrounding these nights.

Dave Widstrand, formerly a Divisional Manager, General Manager, and Area Manager for Scandinavian, testified that salespeople were permitted to sell "turn back the hands of time" contracts[4] even when the promotion was not being run and even if no existing member came in with the new member.[5]

4. The "turn back the hands of time" contract was a promotion in which a prospective member could join at the rate at which an existing club member had joined, even if the club member had joined many years ago at a rate no longer available for memberships. The promotion was a way of getting existing members to bring in their friends as members of the club.

5. Defendants objected to Widstrand's testimony with respect to this subject on the grounds of relevancy, foundation, and hearsay. Widstrand's testimony is relevant to the issue of whether it was acceptable practice for Scandinavian employees to use the turn back the hands of time promotion at times when the promotion was not officially being run. If this practice were allowed, then the fact that Plaintiff was written up for doing so would be an indication that the warning was undeserved. With respect to the claim of hearsay, Widstrand testified as to matters within his own knowledge. To the extent that Widstrand testified as to what Jeff Stockstill told managers about the acceptability of this practice, the testimony is not hearsay because it was not offered for the truth of its contents, but for the fact that it was stated. If Stockstill told managers that (Cont'd)

Widstrand further stated that he himself sold such contracts and was never disciplined for doing so. Widstrand also testified that calling in "non-existent gross"[6] was commonplace among Divisional Managers, including himself, but that he never received any written warnings for doing so.

The Divisional Managers at Kendall II during this time could not have been expected to sell $5000 per day in memberships. Each DM would generally sell on fifteen days of each month. At sales of $5000 per day, a DM would be expected to sell $75,000.00 in memberships in a month. Neither Willin nor Franklin ever achieved this level of sales in any month at Kendall II. Thus, the "requirement" that Franklin reach $5000 in sales each work day could not have been applied generally to the Divisional Managers at Kendall II in 1990.

28. Mark Seaman instructed Stuart Dansby to give Franklin written warnings during September and October of 1990. Dansby Depos. at 330.

(Cont'd)
they could use the hands of time promotion in this way, then managers would think that this practice was allowed, even if it were not in truth permitted. Defendants have not specified their foundation requirement with enough specificity for this Court to determine what portion of the six pages of testimony to which the objection was raised lacks foundation. We see no such infirmity in Widstrand's testimony on this point.

6. At the end of the work-day, the Divisional Managers were required to call in their teams' sales for the day. Calling in non-existent gross would mean that the Divisional Manager had called in a number for the day that was greater than the amount of sales actually made that day.

29. Despite these warnings, Dansby testified that he was satisfied with the Plaintiff's performance during that time. He stated that she had done all that could be expected of her with the burden of both staffs on her shoulders in September.

30. After this difficult month, Franklin requested a vacation in October. This request was granted, in writing, by both Seaman and Dansby. Pltff.'s Exh. 29 at 000017. The vacation was scheduled for October 13th through 21st.

31. In the first ten days of October, Franklin's personal sales totalled $8321.47. With a sales quota of $50,000.00 for October, Plaintiff's sales were less than what would be expected for the first third of the month (i.e. less than one-third of her quota) if Plaintiff were to meet her quota for the month. However, in several other months during 1990, Franklin's early sales figures were less than one-third of quota, and she obtained her personal quota in each of those months.[7]

32. Approximately two days before Franklin's vacation was to begin, Seaman and Dansby insisted that she cancel the vacation and increase her sales production over the next ten days or she would be demoted. Dansby testified that cancelling

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7. The following table shows four months in which Plaintiff's initial sales were low but in which she eventually reached her quota:

Month	*10-day sales*	*Times Three*	*Quota*	*% Quota Reached*
March	$14,377.48	$43,132.44	$50,000.00	127
April	$16,116.00	$48,348.00	$50,000.00	123
May	$13,573.00	$40,719.00	$60,000.00	103
June	$17,051.25	$51,153.75	$60,000.00	100

Data from Pltff.'s Exh. 4, Sales Detail Audits.

Franklin's vacation was Seaman's idea. Dansby disagreed with this move because he felt Franklin had done a good job in September and would not have cancelled her vacation. Nonetheless, he went along with Seaman's decision. Franklin was then given an ultimatum — to get her numbers up in the next ten days or she would be demoted. However, no specific number was set for Plaintiff to achieve during that time, and it was unclear what was then expected of her.

33. Despite having already purchased plane tickets and made other reservations for her vacation, Plaintiff cancelled her trip and remained at work. The sales detail audit report for Plaintiff's October sales shows that from October 11th through October 19th, Franklin's sales totalled $13,581.97. Before the end of this ten-day trial period, however, Franklin was told that she was being demoted. Plaintiff was then given the choice of being a Program Director — the entry-level sales position — at Kendall II, or becoming a Divisional Manager at the North Miami club, a non-executive facility. Seaman had no supervisory role over the North Miami club at that time. Franklin chose the North Miami club alternative.

34. Although Defendants suggested that Franklin herself requested the move to North Miami, we find that no such request was ever made until Plaintiff was given the above-mentioned choice. In particular, we credit the testimony of Stuart Dansby regarding the Plaintiff's demotion. Dansby first testified that Seaman initiated the issue of demoting Franklin when he insisted that she be told to either get her numbers up or be demoted. Dansby Depos. at 203. Dansby further stated directly that Franklin did not request the transfer. *Id.* at 156-57. Ultimately, Dansby testified that Seaman decided to demote Franklin, and he went along with the decision despite his own reservations.

In fact, Dansby said that he felt the decision was made too quickly and that Franklin's performance was not deserving of a demotion. *Id.* at 271, 297. In addition, the Plaintiff herself testified credibly that she did not choose to transfer to North Miami, but only asked for that position after being given the demotion alternatives.

35. The Plaintiff's transfer from Kendall II to North Miami at the Divisional Manager's position was a demotion, not a lateral transfer. Selling memberships at a non-executive club was more difficult than at an executive club because the smaller size and fewer amenities drew less traffic into the club, resulted in a smaller member base, and made selling a membership more difficult. A Divisional Manager at a non-executive club was generally expected to earn less than a Divisional Manager at an executive club because of the lower overall membership sales rate at those facilities. This difference was offset to some degree, however, because non-executive clubs had lower sales quotas, making it easier to obtain override compensation. Nonetheless, the earnings potential of a Divisional Manager at a non-executive club was widely viewed as less than that for a Divisional Manager at an executive club. Every present and former Scandinavian employee to testify at trial or in deposition, with the singular exception of Mark Seaman, agreed that a transfer from a Divisional Manager position at an executive club to a Divisional Manager position at a non-executive club was a demotion. With respect to the Plaintiff in particular, Stuart Dansby testified repeatedly about her "demotion" to North Miami. In addition, where Plaintiff was given the choice between taking an entry-level position at the Kendall II club or the DM position at North Miami, the transfer can only be seen as a demotion for the Plaintiff. Indeed, if the transfer were not a demotion, then offering Plaintiff the choice of a demotion to

the Program Director position as an alternative would have made no sense whatsoever.

B. Claim of Constructive Discharge

36. Franklin remained at the North Miami club for three months. During that time, there is no evidence that Franklin experienced any sexual harassment or other discriminatory treatment. In fact, the Plaintiff offered no evidence that she even encountered Seaman or Dansby in any way during this time. However, she testified that she was unhappy at North Miami because the membership was primarily black, while she was white, and that there was a lot of racial tension in the club. Franklin also stated that she was afraid to be the last one at the club in North Miami and have to physically check the facilities and lock the doors alone. As a result of this fear and the racial tension at North Miami, Franklin requested a transfer out of the North Miami club in January of 1991. Area Manager Jeff Stockstill informed the Plaintiff that no Divisional Manager positions were available at that time, and Franklin requested a transfer to a Program Director position at the Waterways club. At that time, Mark Seaman had no supervisory role with respect to the Waterways club.

37. Rhonda Smith was the General Manager of the Waterways club in early 1991. Franklin was placed on the "A" team, under Divisional Manager Joe Picone. Likewise, there is no evidence that the Plaintiff suffered any discriminatory treatment while at the Waterways club or encountered even a single instance of sexual harassment there.

38. In February of 1991, Scandinavian announced a drastic reorganization of the South Florida market in response to the

overall poor fiscal performance of the South Florida area during 1990. The reorganization wholly restructured the management scheme of the South Florida clubs, eliminating the General Manager/two Divisional Manager staffing of each facility. The Program Directors at all eleven South Florida clubs would now come under the supervision of two co-managers, with equal responsibility for the administration of each club. These co-managers, in turn, reported to one of four area supervisors. The reorganization also drastically reduced the sales commission system in the South Florida clubs. Salespeople and managers at *all* South Florida facilities suffered approximately a 60 percent reduction in pay.

39. The Scandinavian reorganization took effect in March of 1991. The change in compensation and management structure prompted a mass exodus of both male and female employees from the South Florida Scandinavian clubs. Both Ron Wilcox and Rhonda Smith urged Franklin to stay with Scandinavian. However, Franklin quit her job with Scandinavian to join Spa Lady, a direct competitor of Scandinavian, effective March 1, 1991.

40. Also in February of 1991, Mark Seaman became the Area Manager for the entire South Florida region. There is no evidence that Seaman and Franklin came into contact during the approximately two weeks in which he was Area Manager and Franklin was still at the Waterways club. Although Franklin testified that she left the employ of Scandinavian as a result of her past problems with Seaman and his new management role, we find that Franklin was one of a number of employees who found their earnings potential within the Scandinavian system drastically reduced and chose to leave the company for that reason.

Appendix E

II. CONCLUSIONS OF LAW

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, provides, in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e-2.

2. For sexual harassment to be actionable under Title VII, however, the harassing actor must be an "employer," as defined by 42 U.S.C. § 2000e(b), i.e., an individual or firm that is "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person. . . ." *Id.* Defendants here concede that they are "employers" within the meaning of Title VII. Joint Pre-trial Stipulation ¶ V.10. Defendant Bally, however, contends that it is not Plaintiff's employer. The Plaintiff, conversely, argues that Defendants Scandinavian and Bally are sufficiently integrated to be considered a single "employer" within the meaning of Title VII.

3. A grouping of employers may be considered as one "employer" if they are highly integrated with respect to

ownership and operations. *See Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983) (parent and subsidiary constituted single "employer"); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389 (8th Cir. 1977) (commonly owned and managed radio station and management company constituted single "employer"). Courts considering whether nominally separate entities should be treated as an integrated enterprise for the purposes of Title VII generally have employed the standards promulgated by the National Labor Relations Board:

> a. The degree of interrelation between the operations.
>
> b. The degree to which the entities share common management.
>
> c. The centralized control of labor relations, and
>
> d. The degree of common ownership or financial control over the entities.

Armbruster, 711 F.2d at 1337; *Stuart Broadcasting*, 560 F.2d at 392.

a. In the instant case, there is scant evidence of interrelation of operations. The Plaintiff has attempted to show interrelation of operations through proof that: (1) two individuals, Michael and Eugene Palumbo, held positions both with Scandinavian and another of Bally's wholly-owned subsidiaries, Health and Tennis Corporation of America ("HTCA"); (2) HTCA held a series of sexual harassment seminars which were attended by Scandinavian employees; (3) Mark Seaman and two employees of HTCA answered interrogatories for both Defendants in this case; (4) the Monthly

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Marketing Guide book issued by HTCA was used by numerous Bally subsidiaries, including Scandinavian; (5) certain advertisements run in *The Miami Herald* used the names "Bally's Scandinavian," "Bally's Health & Tennis Corporation of America," and noted at the bottom, "Bally's Health & Tennis Corporation. Over 300 Locations Across the Country;" and (6) Ed Haggerty, Director of Internal Affairs for Bally, went to the Waterways club in April of 1990 to investigate a potential problem in the club. The vast majority of this evidence, however, relates only to a potential interrelationship between Scandinavian and HTCA or other Bally subsidiaries, not a relationship between Bally and Scandinavian. The fact that advertisements were run using the name "Bally's Scandinavian" and that one Bally employee came to the Waterways club on a single occasion in April of 1990 provides little evidence of interrelation of operations.

b. There is no evidence whatsoever of any sharing of common management by Scandinavian and Bally.

c. There is similarly no evidence of a centralized control of labor relations between Bally and Scandinavian.[8]

d. The final factor — degree of common ownership or control over the entities — has been admitted by the Defendants. Scandinavian is 100 percent owned by HTCA, which is in turn 100 percent owned by Bally's Health and Tennis corporation, which is 100 percent owned by Bally.

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8. Plaintiff points to certain documents in the Plaintiff's personnel file which show the names of other Bally subsidiaries, including HTCA, in addressing changes in the Plaintiff's employment status. Again, these records do not associate Bally with Scandinavian, and Plaintiff has not attempted to include these other entities in this lawsuit.

4. The degree of interrelationship between Bally and Scandinavian, however, is insufficient to support a finding that Bally and Scandinavian constitute a single employer under Title VII. Thus, Plaintiff was employed by Scandinavian and not Bally, and Bally cannot be held liable as the Plaintiff's "employer" under Title VII.

5. The Florida Human Rights Act, Fla. Stat. § 760.10, states, in relevant part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

Fla. Stat. § 760.10. Federal caselaw under Title VII is applicable to the construction and application of the Florida Human Rights Act, which was patterned after Title VII. *Florida Dept. Community Affairs v. Bryant*, 586 So. 2d 1205 (Flat 1st DCA 1991). The Plaintiff's claim under the Florida Human Rights Act is coextensive with her Title VII claim and need not be addressed separately.

6. A plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment, even if no tangible job detriment has occurred. *Harris v. Forklift Sys., Inc.*, __ U.S. __, 114 S. Ct. 367, 370 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986).

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7. In order to prove a hostile environment sexual harassment case, a plaintiff must demonstrate:

> a. that she belongs to a protected group, i.e., that she is a woman;
>
> b. that she was subject to unwelcome sexual harassment;
>
> c. that the harassment complained of was based upon sex, i.e., that the actor did not similarly harass male employees; and
>
> d. that the harassment involved affected a "term, condition or privilege" of employment.

Henson v. City of Dundee, 682 F.2d 897, 903-04 (11th Cir. 1982). Unwelcomeness means that the employee did not solicit or invite the alleged behavior. *Id.* at 903.

8. As to the first factor, there is no question that Plaintiff belongs to a protected class. *See, e.g., Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986).

9. Franklin has also clearly established the second factor, namely, that the harassment occurred because of her gender. She proved this by, among other things, showing that "but for the fact of her sex, she would not have been the object of harassment." *Henson*, 682 F.2d at 904. Plainly the epithet "DM with tits," would not have been applied to male employees and is patently offensive to any reasonable female "who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and

abuse." *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th air. 1988), *cert. denied*, 489 U.S. 1020 (1989). Similarly, the references to Gina Reyes' breasts as "lead boxes" was denigrating to women, as were Seaman's repeated statements about women's abilities as managers. The repeated use of derogatory epithets and comments about women employees were sexually harassing conduct that occurred because Andrea Franklin was a woman.

10. Third, we find that the sexual harassment of Andrea Franklin was not welcomed by her. Franklin complained to Stuart Dansby about his and Seaman's comments, but Dansby's behavior did not change. In addition, the pervasiveness of offensive references to and treatment of women at the workplace by her immediate and indirect superior left her little choice but to attempt to fit in if she wanted to keep her job. *Bundy v. Jackson*, 641 F.2d 934, 945-46 (D.C. Cir. 1981) ("If the employer demands no response to his verbal or physical gestures other than good-natured tolerance, the woman has no means of communicating her rejection. She neither accepts nor rejects the advances; she simply endures them. She might be able to contrive proof of rejection by objecting to the employer's advances in some very visible and dramatic way, but she would do so only at the risk of making her life on the job even more miserable.").[9] The Plaintiff's failure to complain to Seaman's

9. We note in this regard that the Defendants have attempted to defeat the Plaintiff's claim of unwelcomeness by showing that the Plaintiff does not harbor hard feelings towards Stuart Dansby. We find that the Plaintiff, having asked Dansby to cease his harassment, was under no obligation to alienate her direct boss by publicly objecting to his running commentary. The fact that Franklin may not have felt or expressed any ill will towards Dansby cannot be taken as an indication that his offensive comments were welcomed by her.

superiors alone will not defeat a claim of unwelcomeness. In no event were Dansby and Seaman's derogatory remarks and treatment welcome.

11. To prove the fourth element, namely, that the sexual harassment affected a "term, condition, or privilege" of employment within the meaning of Title VII, the harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Vinson,* 477 U.S. at 67 (quoting *Henson* 682 F.2d at 904). The hostile work environment complained of need not result in psychological injury to the plaintiff to be actionable under Title VII. *Harris*, 114 S. Ct. at 370-71. "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." *Id.* at 371 (citation omitted). Thus, this element of the hostile environment claim is evaluated both on a subjective and an objective basis. The factors to be considered when evaluating this element of a hostile work environment claim include: "the frequency of the discriminatory conduct, the severity of the discriminatory conduct, whether the conduct is threatening or humiliating, and whether the conduct unreasonably interfered with the plaintiff's performance at work." *Edwards v. Wallace Community College*, 49 F.3d 1517, 1521-22 11th Cir. 1995) (citing *Harris*, 114 S. Ct. at 372).

The pervasive sexual hostility at the Kendall II club was such that a reasonable woman would perceive the environment as sexually abusive, and Plaintiff did perceive the workplace as hostile and abusive. Applying the factors set out by the Eleventh Circuit, we first find that the discriminatory conduct in this case was frequent. The epithet "DM with tits" was a frequent means of reference to the Plaintiff to her face, in front of

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Franklin's staff and in the presence of club members, between Dansby and Seaman, and by Seaman when speaking to other managers. In addition, Seaman's use of highly offensive name-calling and open denigration of the value of female employees in numerous settings left the general impression among Scandinavian employees that Seaman disliked women in the workplace and women managers particularly. It is highly offensive that a manager would use a derogatory term like "DM with tits" repeatedly and in nearly the same manner as one might use an employee's name. While the conduct directed at Franklin herself was not "severe" in the sense that there was no physical contact or intimidation, its repetition was so pervasive that it was commonplace. Seaman's comments were repeated with such regularity that his dislike for women was commonly known among his co-workers and subordinates. The continuous use of derogatory epithets to describe women and the pattern of statements denigrating female employees' abilities as workers and managers, "create[d] a barrier to the progress of women in the workplace because it convey[ed] the message that they do not belong, that they are welcome in the workplace only if they will subvert their identities to the sexual stereotypes prevalent in that environment." *Robinson v. Jacksonville Shipyard, Inc.*, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991). Third, there is no question that Seaman and Dansby's comments humiliated Franklin both in front of the staff she was expected to manage and in front of club members. With respect to the final factor, the gender hostility suffered by Franklin undermined her ability to effectively manage her team by demeaning her in front of them. A reasonable person in Franklin's position would feel denigrated, humiliated and devalued by her direct and indirect supervisors, and the pervasive use of sexually derogatory remarks would affect any woman's ability to effectively manage a staff and stay motivated to sell in the highly pressured sales

environment at Scandinavian, and the Plaintiff herself was negatively affected by the abusiveness of this treatment.

12. Corporate liability for sexual harassment by corporate employees under a hostile work environment theory is based on the doctrine of repondeat superior, and the plaintiff must show that the corporate defendant "knew or should have known of the harassment and failed to take prompt remedial action against the supervisor." *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (distinguishing between quid pro quo and hostile environment sexual harassment and applying respondent superior standard to hostile environment case), *reh'g denied*, 874 F.2d 821 11th Cir. 1989).

We find that Scandinavian either actually knew or should have known of the sexually hostile treatment being heaped upon Plaintiff and other females by Seaman in particular. First, Seaman's derogatory view of women employees was widespread and well-known by Scandinavian employees, both male and female. Seaman was a supervisor of numerous individuals at this time, and his conduct would have been apparent to his supervisors, who held relatively high-level positions with Scandinavian. Scandinavian should have known that a sexually hostile work environment was present in Seaman's clubs. We reach this conclusion based upon the testimony of Cindy Watson, Ana Remond, Rhonda Smith, Gina Reyes, Ron Wilcox, and Plaintiff herself that Seaman's attitude towards female employees was blatantly hostile and readily communicated to others. In addition, Wilcox testified that Seaman made derogatory comments about women managers and employees at a meeting regarding Andrea Franklin's demotion at which Jeff Stockstill was present. Wilcox recalled Seaman making "really off-color remarks . . . something really derogatory . . .

alluding to her anatomy," and that Seaman went on to state that all women in the company were problems and that he wished there were no female Divisional Managers. Wilcox Depos. at 50-52. Wilcox recalled Seaman having stated that he was "sick and tired of DMs with tits." *Id.* at 52-53. Jeff Stockstill, as Seaman's manager, should have, at the very least, taken action at that point in time. Stockstill himself testified that he should have been more aware of the circumstances surrounding Franklin's demotion because of Rhonda Smith's May 1990 allegations regarding sexual harassment. Stockstill Depos. at 27-28.[10] Nonetheless, Stockstill took no action, and in fact then

---

10. Stockstill testified as follows:

> Q. [D]o you know why Andrea Franklin was — or did move from the Kendall II club to the North Miami club?
>
> A. I should know that, but I do not. The reason I say I should know it is because it was a very volatile time and that was an interesting situation enough for me to have remembered it, but, no, I do not.
>
> Q. Why do you say it was a volatile time, what do you mean by that?
>
> A. Everyone was very sensitive towards lawsuits or potential misdealings at that time.
>
> Q. Who's everyone?
>
> A. I shouldn't speak for everyone. I was.
>
> Q. Why was that?
>
> A. Because of the Rhonda Smith case.

(Cont'd)

permitted Franklin's demotion from Kendall II to North Miami at Seaman's recommendation. Thus, Scandinavian is liable for the sexual harassment in this case.

13. Plaintiff has also brought a claim of disparate treatment, alleging intentional discrimination on the basis of gender in violation of Title VII in this case, based upon her demotion from Kendall II to North Miami. In disparate treatment cases, if the plaintiff's case is based solely on circumstantial evidence, then the burdens of proof are allocated pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1556 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984). Where the plaintiff has produced direct evidence of discrimination, however, then the *McDonnell Douglas* framework does not apply. *EEOC v. Beverage Canners. Inc.*, 897 F.2d 1067, 1071 (11th Cir. 1990).

14. Direct evidence of discrimination is evidence which, if believed by the Court, would "prove the existence of [discrimination] without inference or presumption." *Carter v. City of Miami*, 870 F.2d 578, 581-82 (11th Cir. 1989).

> [N]ot every comment concerning a person's [sex] presents direct evidence of discrimination. *Young* [v. *General Foods Corp.*], 840 F.2d [825,] 829. . . . [C]ourts have found only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [sex], to constitute direct evidence of discrimination.

(Cont'd)

Stockstill Depos. at 27, line 17–28, line 6. Rhonda Smith testified on cross-examination that she threatened to bring a lawsuit in May of 1990, which included sexual harassment claims.

Id. at 582. Where the decision-maker in an adverse employment action utters a discriminatory comment in the course of the decision-making process, then direct evidence of discrimination is present. *Wilson v. City of Aliceville*, 779 F.2d 631, 634 (11th Cir. 1986) (citing *Miles v. M.N.C. Corp.*, 750 F.2d 867, 873-76 (11th Cir. 1985)). And if the plaintiff has proven that the work environment was sexually hostile, and that the decision-makers were responsible for the sexual hostility, then the evidence of sexual hostility "constitutes direct evidence of discriminatory intent in management decisions," even if the statements made are unrelated to the employment action at issue. *EEOC v. Beverage Canners, Inc.*, 897 F.2d 1067, 1071-72 & n.9 (11th Cir. 1990) (race discrimination).

The Plaintiff has proven her case by direct evidence of discrimination. Seaman was the decision-maker with respect to the demotion of Andrea Franklin. He repeatedly made statements that women were not good employees. Specifically in the context of the decision to demote the Plaintiff, Seaman stated that he wished there were no female Divisional Managers at Scandinavian, that he "was sick and tired of DMs with tits," and that all women Divisional Managers were a problem for him. Seaman made these statements at a meeting with Jeff Stockstill, Ron Wilcox, and Stuart Dansby that was held specifically to address the demotion and transfer of Andrea Franklin. Standing alone, these statements constitute direct evidence that the decision to demote Franklin was substantially motivated by gender bias. When combined with the sexually hostile work environment at Scandinavian, the Plaintiff has plainly shown direct evidence of discrimination. *See Beverage Canners, Inc.*, 897 F.2d at 1071 ("Th[e] overwhelming evidence of racial hostility constitutes direct evidence of discriminatory intent in management decisions.").

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15. In direct evidence cases, if the Court credits the plaintiff's direct evidence of discrimination, then the burden shifts to the defendant to prove by a preponderance of the evidence that "the same decision would have been reached even without the discriminatory factor." *Id.* at 1071; *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977); *Wall v. Trust Co.*, 946 F.2d 805, 809 (11th Cir. 1991); *Wilson v. Aliceville*, 779 F.2d 631, 634 (11th Cir. 1986).

The Defendants have not carried this burden of persuasion. There is no question that the Plaintiff received a number of disciplinary warnings around the time of her demotion. However, these warnings for the most part were made regarding matters for which other similarly situated male employees were not warned. *See Thompkins v. Morris Brown College*, 752 F.2d 558, 564 n.16 (11th Cir. 1985) (unequal application of objective non-discriminatory criteria constitutes pretext for discrimination). Of these warnings, only the charge that Plaintiff forged Stuart Dansby's signature on a contract was of the nature for which any other employee would be disciplined. These warnings are also highly suspect in that Plaintiff was given three such written admonitions on the same day at a time when Seaman was putting great pressure on Stuart Dansby to push Franklin to work harder even though she had been covering both the A and B teams for twenty days at that time. In fact, Dansby testified that Seaman himself told Dansby to issue written warnings to Franklin. Dansby Depos. at 332. There was also evidence that the Plaintiff's sales were low for the first ten days of October. Based on all the evidence, however, her October sales were not so low that she could not have recovered and reached her quota for the month.

These elements would be insufficient cause for demotion, and we find that the Plaintiff would not have been demoted on

these grounds had she not been a woman. Stuart Dansby testified that he did not believe Franklin's performance — including both the warnings and the low production in October — warranted a demotion. Dansby's testimony on this point is particularly valuable in that he was Franklin's direct manager, and he earned money based on how his employees performed. If the Plaintiff or her staff were not selling memberships at an acceptable rate, then Dansby's own income would suffer. The fact that Dansby did not consider Plaintiff's performance below expectations for that time is a strong indication that her demotion was unwarranted. We find that the Plaintiff would not have been demoted but for her gender.

16. "[A]n employer is strictly liable for sexual discrimination by supervisors that causes tangible job detriment." *Henson,* 682 F.2d at 909 (citing *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1091 5th Cir. 1975) (en banc)).[11] Scandinavian is responsible for the Plaintiff's discriminatory demotion.

17. Plaintiff also asserts a claim for constructive discharge. "A claim for constructive discharge requires the employee to demonstrate that the work environment and conditions of employment were so unbearable that a reasonable person in that person's position would be compelled to resign." *Virgo v. Riviera Beach Assoc., Ltd.*, 30 F.3d 1350, 1363 (11th Cir. 1994); *Steele*, 867 F.2d at 1317; *Huddleston v. Roger Dean Chevrolet*, 845 F.2d 900, 905 (11th Cir. 1988); *Wardwell v. School Board*, 786 F.2d 1554 (11th Cir. 1986).

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11. In *Bonner v. Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

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We find that a reasonable person in the Plaintiff's position would not have felt compelled to resign and that, in fact, the reason for the Plaintiff's resignation was the change in corporate structure at the Scandinavian clubs announced in February of 1991. While Mark Seaman was promoted to Area Manager at nearly the same time, giving him a supervisory role over the Plaintiff, the level of contact between the Plaintiff, then a Program Director at the Waterways club, and the Area Manager, would have been minimal at most. Seaman, with responsibility for all eleven South Florida clubs, then managed through four Area Directors, each of whom had responsibility for between two and four facilities. Each club was then run by two Co-Managers who reported to the Area Directors. The Plaintiff's position at that time was three levels removed from Mark Seaman, and she had no regular contact with Stuart Dansby. She was no longer subjected to any sexual harassment at that time. Although the Plaintiff testified that she left Scandinavian because she wanted a management position and that her opportunities for advancement were hampered by Seaman's new supervisory role, she offered no evidence of even a single incident of harassment after she left the Kendall II club. Indeed, the Plaintiff offered no evidence of having even encountered either Seaman or Dansby while working at either the North Miami or the Waterways club. The speculation of some future unspecified failure to promote for discriminatory reasons is not in itself sufficient to make a reasonable person resign. *See Wardwell v. School Board*, 786 F.2d 1554, 1557-58 (11th Cir. 1986) (reversing District Court's finding of constructive discharge because discriminatory refusal to promote, while relevant to the issue of constructive discharge, is not alone sufficient to constitute constructive discharge); *Brusque v. Powell Elec. Mfgr. Co.*, 617 F.2d 61, 65 (5th Cir. 1980) ("We have no question that her resignation resulted directly from her

disappointment in not receiving the raise she had expected. We cannot fault her for her disappointment. Nevertheless, we cannot accept that under the circumstances presented here a reasonable employee would have felt compelled to resign. Moreover, we believe that discrimination manifesting itself in the form of unequal pay cannot, alone, be sufficient to support a finding of constructive discharge."); *see also Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1317-18 (11th Cir. 1989) (affirming District Court's finding of no constructive discharge where only one incident of harassment reported in the two weeks prior to time of plaintiff's resignation). While the Plaintiff was plainly disappointed that her opportunities for advancement would be hampered by Seaman's promotion, her conditions of employment were far from intolerable at that time, and a reasonable person would not have felt the need to resign for this reason. *Bourque*, 617 F.2d at 65 (plaintiff's disappointment in not receiving promotion denied on discriminatory basis was understandable but insufficient to make a reasonable person resign); *Wardwell*, 786 F.2d at 1557 (plaintiff's embarrassment upon discriminatory refusal to promote was not intolerable such that a reasonable person would be compelled to resign).

In addition, and significantly, several present and former Scandinavian employees testified as to the drastic change in pay structure that was announced in February and took effect in March of 1991. Numerous employees, both male and female, left the Scandinavian health clubs at that time because their earnings potential had been reduced by approximately 60 percent. We are convinced and find specifically that the Plaintiff left Scandinavian for Spa Lady because of this drastic reduction in earning potential. *See Huddleston v. Roger Dean Chevrolet*, 845 F. 2d 900, 905-06 (11th Cir. 1988) (affirming District Court's holding that no constructive discharge occurred, despite

finding of pattern of sexual harassment, where another plausible explanation supported by record evidence was found to be the cause of the plaintiff's resignation). Thus, we can find no constructive discharge in this case.

18. Plaintiff Andrea Franklin is entitled to backpay from the date of her demotion from the Divisional Manager position at the Kendall II facility (11/01/90)[12] until the date of her voluntary resignation (03/01/91). The Plaintiff is not entitled to backpay for the period after she voluntarily left Scandinavian; nor is she entitled to front-pay or reinstatement. *See Bourque v. Powell Electrical Mfgr. Co.*, 617 F.2d 61, 66 n.8 (5th Cir. 1980); *Morrison v. Genuine Parts Co.*, 828 F.2d 708, 710 n.1 (11th Cir. 1987), *cert. denied*, 484 U.S. 1065 (1988); *Campbell v. Kansas State Univ.*, 780 F. Supp. 755, 766 (D. Kan. 1991). Plaintiff's backpay shall be computed based on the salary of Jim Willin,[13] her male counterpart at Kendall II, for the period in question, subtracting the amount she actually earned during

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12. Although Franklin was informed of the decision to demote her on October 18, 1990, the transfer was effective November 1, 1990. Plaintiff's backpay proposal reflects a request for backpay beginning with the first full pay period in November of 1990.

13. Defendants oppose this calculation for the period beginning in January of 1991, arguing that the Plaintiff did not earn as much as Jim Willin while both he and Franklin were Divisional Managers at Kendall II. Defendants instead propose that if backpay is awarded for that period, that the Plaintiff be compensated on the basis of the average earnings of the two Divisional Managers at Kendall II during that time — Ruy Tamayo and Jim Willin. We find, however, that the great disparity in earnings between Willin and Tamayo for this period would result in underpaying the Plaintiff. Her earnings while at Kendall II were very close to those of Jim Willin. Thus, we find that Jim . . . [text missing from original]

this time.[14] Plaintiff is entitled to an award of $12,229.65 in backpay, plus pre-judgment and post-judgment interest at IRS prime rates calculated in accordance with 28 U.S.C. § 1961. *EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507 (11th Cir. 1987).

Therefore, based on the evidence and arguments presented, it is hereby

ORDERED and ADJUDGED that judgment is hereby entered in favor of Defendant Bally Manufacturing Corp., and against Plaintiff Andrea Franklin, with respect to her claims against Bally Manufacturing Corp. It is further

ORDERED and ADJUDGED that Plaintiff, Andrea Franklin, shall recover from the Defendant Scandinavian Health Spa, Inc., judgment for damages in the aggregate amount of $12,229.65, plus prejudgment and post-judgment interest, for violation of Title VII and Florida Statutes Chapter 760. Plaintiff, as a prevailing party in a Title VII action, is also entitled to recover reasonable attorney's fees pursuant to 42 U.S.C.

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14. The actual earnings of both the Plaintiff and Jim Willin are taken from the Payroll History Register for 1990 and 1991. Four fourteenths (4/14) of the earnings for pay period 03/10/91 are included in the calculation as an estimation of the pay for both Franklin and Willin for the last four days of February. Although the monies received by Franklin in the period after March 1, 1991, plainly were earned while she was working at Scandinavian, we find that the inclusion of these later amounts in her salary for the period in question would result in double-counting of her earnings. Plaintiff's earnings for November, for example, would include some commissions earned in October but not credited until the November time-frame. Thus, to also include these later-credited amounts for Franklin, but not for Willin, would result in underpayment to the Plaintiff.

§ 2000e-5(k), as well as her costs. A proposed Order of Final Judgment, as well as Plaintiff's claim for attorneys' fees and costs, shall be submitted by Plaintiff within ten (10) days of this Order.

DONE AND ORDERED in Miami, this 30th day of August, 1995.

s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE

copies to:
counsel of record

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED DECEMBER 1, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 95-5228; 96-5367

ANDREA FRANKLIN,

Plaintiff-Appellee,

versus

BALLY MANUFACTURING CORPORATION, a Delaware Corporation; SCANDINAVIAN HEALTH SPA, INC.; an Ohio Corporation,

Defendants-Appellants,

MARK SEAMAN; MICHAEL PALUMBO; EUGENE PALUMBO, etc.,

Defendants.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: CARNES, Circuit Judge, KRAVITCH and REAVLEY*, Senior Circuit Judges.

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* Honorable Thomas M. Reavley, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Appendix F

PER CURIAM:

The petition(s) for rehearing filed by the Appellant, Scandinavian Health Spa, Inc. is DENIED.

ENTERED FOR THE COURT:

s/ E. Carnes
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
APR 2 1998
OFFICE OF THE CLERK

No. 97-1430

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SCANDINAVIAN HEALTH SPA, INC.,

Petitioner,

v.

ANDREA FRANKLIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

WHETHER A DISTRICT COURT'S THOROUGHLY REASONED FEE AWARD TO A PREVAILING TITLE VII PLAINTIFF, AFFIRMED BY THE COURT OF APPEALS BECAUSE IT FOUND THE CHALLENGE TO IT SO LACKING IN MERIT THAT IT DID NOT "WARRANT DISCUSSION," PRESENTS A QUESTION REQUIRING THE EXERCISE OF THE COURT'S SUPERVISORY POWER TO REVIEW FOR ABUSE OF DISCRETION THE DETERMINATION THAT CONGRESS DID NOT INTEND TO LIMIT FEE AWARDS TO A PROPORTION OF MONETARY RECOVERY, THEN LIMITED BY TITLE VII TO BACKPAY.

A. Whether A District Court Abuses Its Discretion By Awarding Fees For Services Rendered After A Victim Of Unlawful Discrimination Rejects A Settlement Offer For Far Less Than Backpay Recovered At Trial Plus Fees Accrued Through The Date Of The Offer.

B. Whether A District Court Abuses Its Discretion By Awarding Fees Limited To Time Spent Successfully Establishing Title VII Claims For Sexual Harassment And Discriminatory Demotion Which Yielded Both Declaratory Relief And Equitable Backpay When The Operative Facts Were Conceded Below To Be "Intertwined And Overlapping" With An Unsuccessful Constructive Discharge Claim.

C. Whether A District Court Abuses Its Discretion By Awarding Fees Which Compensate For Time Necessarily Incurred Because Defendant Unreasonably And Exorbitantly Increased The Cost Of Litigation By Conducting Excessive Discov-

ery, By Injecting Groundless Issues And By Greatly Expanding The Scope Of The Trial In An Apparent Effort To Exhaust The Prevailing Plaintiff's Resources.

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STATEMENT OF THE CASE

The petition for certiorari rests upon false premises, and presents an issue unlikely to recur. It inaccurately contends that respondent rejected a reasonable settlement offer, and that respondent pursued unrelated long shot claims to unreasonably increase her fee claim. Stripped of its false premises, the petition seeks only to enmesh the Court in further review for abuse of discretion of a routine attorney's fee calculation. Petitioner suggests that in reviewing the exercise of discretion below, the Court overturn *City of Riverside v. Rivera*, 477 U.S. 561 (1986), to impose a rule of proportionality to fee calculations in civil rights damage litigation. But this case is not and never was a civil rights damage action; it arose under provisions of Title VII of the Civil Rights Act of 1964, since amended, which limited monetary relief to equitable backpay awards. The Court has never suggested that Title VII fee awards be limited to a proportion of backpay. With the passage of the Civil Rights Act of 1991, victims who like respondent suffered intentional discrimination are no longer limited to recovering backpay; thus, the questions presented in this litigation are unlikely to recur. A magistrate, the District Judge, and the Court of Appeals have all examined the record, and applying standards established in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and refined in the many decisions which have followed in its wake, have resolved the fees due. Plainly stated, there is no substantial question presented for review.

1. Proceedings in the District Court.

Petitioner intentionally discriminated against respondent by subjecting her to an abusive and oppressive work environment because of her gender, and demoted her

because of her gender. She eventually resigned, and sued under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. seeking backpay, injunctive and declaratory relief. Because section 706(g) of Title VII then limited monetary relief to equitable backpay, respondent demanded only backpay in amounts conforming to proof. Although respondent also asserted claims under state law against petitioner and other defendants, she voluntarily dismissed those claims early in the litigation. From its inception through trial, respondent's claim was straightforward—she claimed that she was harassed and demoted because of her gender, and that the combination of the harassment and demotion constituted a constructive discharge.

Fifteen months after respondent filed suit, petitioner offered by letter which appears as the appendix to this brief to settle her claims for a single lump sum payment of $17,500. By that date, respondent had already incurred substantial fees and expenses in extensive discovery; her fee application reflects expenditures for fees and expenses in excess of $45,000 through the date of the settlement offer. Respondent quite reasonably rejected a settlement offer which would have netted her a negative recovery, leaving her worse off than before suit was filed. Petitioner never filed an offer of judgment, and no other settlement offers appear in the record of the courts below.

Petitioner conducted an unnecessary, expensive, and time consuming but unsuccessful defense, greatly complicating what began as relatively simple litigation. Petitioner insisted without foundation that respondent's demotion was only a voluntary transfer to a lower paying position, that respondent was unproductive, and that respondent had not been subjected to a hostile work

environment. Petitioner noted twelve separate depositions, some of which lasted for two days. Contesting every issue, petitioner undertook a "scorched earth" defense, forcing respondent to address the many unsubstantiated issues it unreasonably injected into this litigation. Petitioner succeeded only in transforming what began as a simple lawsuit into an unnecessarily complex five day bench trial.

Respondent prevailed at trial; the District Court entered judgment for her after finding that petitioner intentionally discriminated against her because of her gender by harassing her and demoting her. The judgment awarded respondent equitable relief—backpay from the date of her demotion through the date of her resignation. Because it concluded that the sexual harassment and demotion were insufficient to constitute a constructive discharge, the District Court declined to award respondent additional equitable relief, concluding that her backpay accrual terminated with her resignation.

2. **The District Court Fee Proceedings.**

Respondent sought and obtained as additional relief the reasonable attorney's fee to which she was entitled. Fee proceedings were straightforward, conducted before a magistrate under the framework established in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Respondent submitted a fee application with supporting affidavits from which she eliminated all time and expenses discretely spent on her voluntarily dismissed claims and her constructive discharge claims. Petitioner filed an opposing memorandum, but did not request an evidentiary hearing. The magistrate expressly found the fee application to be reasonable, noting that the operative facts relevant to the several claims were "overlapping and intertwined. . . ."

(Petition for Certiorari, Appendix C, at 12a). Responding to arguments repeated here, the magistrate observed: "While the requested fee appears high, it does not seem excessive *due to the numerous depositions completed before trial, the numerous issues which went to trial, and the degree to which defendants defended the case.*" (Petition for Certiorari, Appendix C, at 13a)(emphasis added). Accordingly, the magistrate recommended a fee of $168,978.50.

The District Court reviewed de novo the record before the magistrate, and entered an order granting the recommended fee. Judge Marcus stated:

> The central contention raised by defendants is that the "lodestar" figure should be adjusted downward because plaintiff succeeded only on certain claims and was awarded only a portion of her requested damages. As the Magistrate Judge noted, and indeed as this Court observed in the course of the bench trial, operative facts relevant to several of the claims were plainly intertwined and overlapping. Defendants' suggestion that the Court should attempt to dissect the interlocking pieces of evidence is unavailing here. We are satisfied that the fee calculus has excluded the excessive, redundant, and otherwise unnecessary. Plaintiff's claims were based upon a central core of facts. She successfully litigated whether a sexually hostile work environment existed and she successfully proved that she was discriminatorily demoted. Under the particular facts and circumstances of this case, we are convinced that this "lodestar" fee is both fair and reasonable. The labor of plaintiff's counsel ultimately resulted in successfully proving much of the core facts of the case, secured a personal damage award,

and vindicated clear congressional policy against discriminatory work practices.

(Petition for Certiorari, Appendix B, at 5a)

3. **Proceedings Before the Court of Appeals.**

Reprising its trial strategy, petitioner launched a broad based but unsuccessful challenge on appeal to virtually every aspect of the merits of the judgment below and the fee award, submitting a 55 page brief in support of its appeal. Petitioner devoted only the last *four and a half pages* to its challenge to the fee award, conceding that "*the district court correctly noted that the operative facts relevant to Franklin's claims were intertwined and overlapping.*" Brief of Petitioner before the United States Court of Appeals, at 51 (emphasis added). Despite its concession, petitioner advanced two arguments below: that fees were excessive compared to the monetary recovery, and that fees should be denied because respondent refused a settlement offer which would have produced a negative net recovery. During oral argument, petitioner never discussed the fee award.

The Court of Appeals affirmed by opinion, noting that petitioner's cursory challenge to the fee award was among several arguments which did not "warrant discussion." (Petition for Certiorari, Appendix A, at 21). The Court of Appeals awarded Respondent a reasonable attorney's fee for appeallate proceedings, and remanded the determination of that award to the District Court. Respondent has sought an award of $33,750 for proceedings before the Court of Appeals; that application remains pending.

REASONS WHY THE WRIT SHOULD BE DENIED

The Petition for Certiorari should be denied for four reasons:

1) Petitioner Made Only Patently Unreasonable Confidential Settlement Offers Which Were Inadequate Both In Form and Content To Curtail Fee Accrual Under Rule 68.

2) Petitioner Conceded Below That Respondent's Successful and Unsuccessful Backpay claims Arose From a Common Core of Overlapping and Intertwined Facts, Foreclosing Its Argument, Unsupported by the Record, That Respondent Pursued Unrelated "Long Shot" Claims.

3) The Court of Appeals Properly Reviewed the Fee Award Reasonably Determined by the District Court under a Properly Stated Rule of Law, Taking into Account Petitioner's Excessive and Unnecessary Litigation Tactics Which Account for the Substantial Time Spent.

4) Limiting Fee Awards to a Proportion of Backpay When, by Statute, Relief Was Limited to Backpay Is Contrary to Clear Congressional Intent Under Title VII And Its Twin Goals of Eradicating Discrimination While Making Whole Its Victims, And Presents an Issue Unlikely to Recur.

ARGUMENT

Beginning with *Hensley v. Eckerhart*, 477 U.S. 561 (1986), the Court established a well understood and workable system for determining the fee due plaintiffs who prevail in claims under Title VII, integrating Rule 68 into that calculus through *Marek v. Chesney*, 473 U.S. 1

(1985).[1] Each of the courts below—the magistrate judge, the District Judge, and the Court of Appeals—followed that system. Both the magistrate judge and the District Judge faithfully and independently applied *Hensley* to calculate a reasonable fee due following a successful suit under Title VII which established two separate claims—unlawful sexual harassment and an intentionally discriminatory demotion. The Court of Appeals reviewed the District Court's exercise of discretion, found no abuse, and affirmed, noting that petitioner's cursory challenge to the fee award presented no issue which "warrants discussion."

Contrary to the petition, the Court of Appeals was correct. Petitioner conceded below that the claims advanced by plaintiff were "interlocking and intertwined," and both the magistrate judge and District Judge independently found them to be so intertwined as to defy separation. Fees were substantially greater than plaintiff's recovery for two reasons—petitioner unreasonably inflated the cost and duration of litigation through excessive discovery and the introduction of extraneous issues into the litigation, producing a five day trial, and petitioner violated Title VII before the effective date of the Civil Rights Act of 1991, foreclosing an otherwise inevitable substantial award of compensatory and punitive damages.

Petitioner's argument that the courts below misapplied *Hensley* misses the mark for three reasons: 1) it rests upon a mischaracterization of proceedings below; 2) when properly presented, the petition seeks only to employ the resources of this Court to review the trial

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[1] The Court reaffirmed Hensley in *City of Riverside v. Rivera*, 477 U.S. 1 (1986), and has applied it consistently in every fee dispute before it.

court's exercise of discretion, and 3) it advances a proposed rule of proportionality to frustrate congressional intent under a statute which then limited monetary relief to backpay. Because *Hensley* and *Marek* work and work well, because the courts below properly followed them under a statute which then restricted monetary relief to backpay, and because the Civil Rights Act of 1991 forecloses the recurrence of proportionality disputes in claims for intentional discrimination, the petition should be denied.

Petitioner mischaracterizes the record below, failing to account for the role of its own litigation tactics in greatly increasing the cost of this litigation. Properly presented, the record below establishes the reasonableness of the fee award. We address the mischaracterizations in turn.

A. No Avoidable Fees: Respondent Rejected Patently Unreasonable Settlement Offers Outside the Scope of Rule 68.

Months after the litigation began, petitioner made the single offer to settle this litigation which appears in the record below, offering a lump sum payment of $17,500 by letter reproduced as an appendix to this brief. Petitioner made its offer in plain and unambiguous language through experienced counsel, well aware that by that time in the litigation, respondent had necessarily incurred much more than that sum in litigation costs and fees. The courts below found that at the time of the offer, respondent had already reasonably incurred fees and expenses in excess of $45,000.00. Respondent rejected the offer because it would have yielded a negative net recovery. Had respondent accepted she would have recovered $17,500 minus $45,000—a balance of negative $27,500 for enduring sexual harassment and a discrimina-

tory demotion. Respondent quite reasonably rejected an offer which left her worse off than if she had not filed suit.

The district court properly disregarded the rejected offer for two reasons: 1) Petitioner elected not to make an offer of judgment under Rule 68, and 2) even applying the standards of Rule 68, the offer was ineffective to terminate the fee accrual because it was far less than the sum of accrued fees and petitioner's recovery.

As the master of its offer, petitioner was free to choose both its form and its terms. By choosing confidential correspondence rather than an offer of judgment, petitioner deliberately elected to forego the benefits Rule 68 potentially offers. Rules 68 and 5 require the service and filing of an offer of judgment. By imposing a measure of formality, the rules assure that the timing, terms, acceptance and expiration of an offer of judgment are immediately ascertainable. By contrast, confidential settlement discussions between parties require reconstruction of events based upon evidence generally inadmissible under Rule 408 of the Federal Rules of Evidence; that reconstruction can generate satellite litigation over the precise course, context, and content of the negotiations. Petitioner's invitation to treat confidential settlement proposals as the functional equivalent of an offer of judgment should be rejected; it seeks improperly to rewrite through litigation the Federal Rules of Civil Procedure.

Even were the Court to treat petitioner's settlement offer as equivalent to an offer of judgment, *Marek v. Chesney*, 473 U.S. 1 (1985) makes it ineffective to stop the accrual of fees. Rule 68 contemplates "that the offer be one that *allows judgment to be taken against the defendant for both the damages caused by the challenged*

conduct and the costs then accrued" 473 U.S. at 6 (emphasis in original). *Marek* permits lump sum offers under Rule 68 to encourage settlements; they permit a defendant to control its total exposure in its offer, and for that reason are the norm: "If defendants are not allowed to make lump sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers." Id. *See also Evans v. Jeff D.*, 475 U.S. 717, 736-737 (1986) ("a significant number of civil rights cases will refuse to settle if liability for attorney's fees remains open, thereby forcing more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants.")

Marek explains the obligation a lump sum offer imposes upon a plaintiff; it requires the plaintiff to estimate both damages, and costs then accrued, including a reasonable fee for services through the date of the offer. "A reasonable determination whether to accept the offer can be made by simply adding these two figures and comparing the sum to the amount offered." 473 U.S. at 7.

Petitioner offered $17,500 to settle, and claims later to have offered $24,000. The trial court found that respondent had already incurred costs and fees in excess of $45,000 by the date of the one offer of record, and twice that by the alleged second offer, which when added to her trial recovery, greatly exceed the rejected offer. Accordingly, the offer was woefully insufficient to trigger Rule 68's cost shifting provisions.

In a transparent effort to avoid *Marek*, petitioner would shift to respondent responsibility for the terms of its inadequate offer by punishing her for failing to inquire whether the offer was inclusive of fees and costs accrued. Petitioner's argument is meritless; it was the master of its offer, represented by experienced counsel,

and knew well how to communicate an offer which would empower the court to determine and award a reasonable fee. Respondent rejected the offer because it was both unambiguous and inadequate. Petitioner's argument that respondent should have inquired into whether the offer would empower the court to determine fees is simply disingenuous—nothing in the offer reserved any power to the trial court. *See Evans v. Jeff D.*, 475 U.S. at 742 ("Thus far, the Legislature has not commanded that fees be paid whenever a case is settled.") Moreover, petitioner's argument is contrary to *Marek's* explicit instruction to assess the offer by summing estimated costs accrued and damages. Petitioner spoke through its offer with unmistakable clarity, and is responsible for its choice of terms.

Petitioner compounds its error through its assertion that respondent rejected a second offer shortly before trial. Petitioner did not make that assertion before either of the courts below, and the record contains no evidence of that offer. Moreover, coming as it did on the eve of trial, the asserted offer of $24,000 suffered from the same defect as the earlier offer which appears in the record—it was for substantially less than petitioner's recovery as defined by *Marek*—reasonable fees accrued plus backpay. The Court should disregard it because it was not presented below, because it is outside the record, and because it makes no difference under *Marek*.

B. No "Long-shot" Claims: Petitioner Litigated and Prevailed on a Single Case and Controversy for Sexual Harassment and Discriminatory Demotion Under Which Monetary Relief Was Limited by Statute to Backpay.

Petitioner repeatedly mischaracterizes the nature of this litigation to advance its theory, never raised below, that respondent pursued and lost a mythical long-shot primary claim. The judgment of the District Court on the merits elaborates what petitioner seeks to conceal—the true nature of the proceedings below. Respondent sued for sexual harassment and sex discrimination—she claimed to have been subjected to an abusive, hostile environment because of her gender, and to have been demoted because of her gender, and prevailed on both of those claims at trial. Because she eventually resigned under the burden of sexual harassment and demotion, respondent also claimed the unlawful conduct was sufficient to constitute a constructive discharge. Although the trial court found petitioner's unlawful conduct insufficiently severe to establish a constructive discharge, it was that same conduct which formed the basis of the successful claims for sexual harassment and discriminatory demotion. Respondent's assertion of constructive discharge rested upon the identical evidence as her successful claims of sexual harassment and discriminatory demotion. Had respondent pursued only her successful claims for sexual harassment and discriminatory demotion, the court would have heard the same evidence; her claim of constructive discharge bore only upon relief, affecting the duration of her backpay award.

With a degree of candor absent here, petitioner conceded below that the claims for sexual harassment and discriminatory demotion were "interlocking and inter-

twined" with the claim for constructive discharge. Brief of Petitioner Before the Court of Appeals, at 51. Petitioner is bound by that concession below, and cannot now assert otherwise by labeling the constructive discharge an unrelated "long-shot claim."

C. The Court of Appeals Properly Reviewed the Fee Award Reasonably Adjudicated by the District Court Under a Properly Stated Rule of Law.

Because the three claims turned on identical evidence, *Hensley* provided the framework for resolving the fee dispute. Both the magistrate judge and the District Judge independently applied *Hensley*, made detailed findings of fact, and concluded that the fees were reasonably incurred in proving sexual harassment and a discriminatory demotion. The court of appeals reviewed that conclusion for abuse of discretion and affirmed. Respondent now seeks further review of that discretion. The Court should decline the invitation for two reasons: 1) The Court should not exercise its discretionary jurisdiction to review the routine application of discretion under established law by a District Court, and 2) The District Court reasonably exercised its discretion under *Hensley* in light of petitioner's litigation tactics below.

The Court's rules discourage the use of certiorari jurisdiction to review factual findings or to review the claimed misapplication of a properly stated rule of law, yet that is precisely what petitioner seeks. Within the three tiers of the federal judiciary, responsibility for reviewing the trial court's exercise of discretion rests with the Court of Appeals. The Court of Appeals exercised that responsibility, characterizing petitioner's limited argument before it, never advanced in oral argument, as insufficient to "warrant discussion." The extensive

opinions of the trial judge and magistrate judge plainly show that both were apprised of and sought to apply properly stated law, and that they discharged that responsibility with studied care. Because the Court does not sit as a general court of errors, further review of that exercise of discretion is inappropriate under the Court's discretionary jurisdiction. *City of Riverside v. Rivera*, 477 U.S. 561, 581-586 (Powell, J., concurring in the judgment).

Petitioner fails altogether to acknowledge its role in driving up fees through its litigation tactics below. Its rejected settlement proposal foreshadowed its approach. Warning of what would follow rejection, petitioner announced that it should try the case "to help us as to other pending cases, both with the trial experience we would gain *and the message that would be conveyed to the other plaintiffs.*" (emphasis added). The message petitioner sought to convey was plain enough—sue us and we will try to exhaust your resources. Accordingly, petitioner unwisely embarked upon a "scorched earth" defense. Petitioner forced respondent to defend twelve depositions, some of which lasted for two days. Petitioner contested every fact and sought to cobble together evidence that its discriminatory demotion of Respondent with a substantial loss in earnings was a voluntary lateral transfer, or, alternatively, discipline for poor performance. Petitioner succeeded in greatly expanding the scope and cost of this litigation, forcing the court to devote five trial days to its resolution.

Petitioner succeeded in its goal—by inflating the cost of litigation, it "conveyed" to prospective plaintiffs "the message" that it will fight meritorious litigation to the bitter end. In addition, it gained the trial experience its settlement offer insisted it desired for its counsel. But

having chosen that course, it should not turn to this Court for relief from its consequences. The courts below did no more than follow long settled law by compensating respondent for the substantial effort petitioner unreasonably forced her to undertake to establish her claims.

D. Petitioner Seeks to Undermine Clear Congressional Intent and Settled Case Law Governing Fee Awards in Title VII Claims for Backpay.

Congress enacted the fee shifting provisions that accompany Title VII to encourage effective enforcement of public policy, recognizing that the limited monetary relief available through backpay awards otherwise would discourage enforcement. Petitioner's objection to the disparity between backpay and the fee award is addressed to the wrong forum; congressional intent, recited in the many Title VII cases the Court has decided, is clear. Limiting fees to a proportion of backpay when Congress has limited monetary relief to backpay would plainly frustrate that intent. Moreover, it would encourage defenddants to engage in oppressive litigation tactics, forcing upon plaintiffs a Hobson's choice between inadequate compensation in unreasonable settlements and inadequate compensation in uncompensated litigation costs.

Limited fee awards undermine the twin goals of Title VII, first expressed in *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975), of eradicating unlawful discrimination and making whole its victims. The Court has repeatedly reaffirmed *Albemarle*. Petitioner's proposed rule of proportionality between backpay awards and fee awards undermines both policies—it reduces the incentive to voluntarily comply with Title VI, and it frustrates make whole relief by forcing victims of intentional discrimination to accept unreasonably low settlement offers or forego fee compensation.

The Court declined to adopt a rule of proportionality in litigation for claims seeking compensatory and punitive damages under 42 U.S.C. §1983 in *City of Riverside v. Rivera*, 477 U.S. 561 (1986). In suggesting the Court reconsider *City of Riverside*, petitioner ignores the critical difference in the two statutes—while section 1983 authorizes unlimited compensatory and punitive damages, Title VII limited monetary relief to equitable backpay, forbidding either compensatory or punitive damages. Thus, this case does not present an opportunity to reconsider *City of Riverside*, for this was not a claim for either compensatory or punitive damages. Moreover, the Civil Rights Act of 1991 makes the recurrence of the circumstances of this case—backpay for intentional discrimination substantially less than fees—unlikely to recur, since the Act now authorizes compensatory and punitive damages in addition to backpay.

Petitioner intentionally discriminated against respondent, and then inflated the cost of litigation. Under well established law, applied by the courts below, petitioner is responsible for that cost as part of the full compensation for its unlawful conduct. Accordingly, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

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A LEGAL PROFESSIONAL CORPORATION

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November 11, 1993

BY TELECOPY

Robert E. Weisberg
1450 Madruga Avenue
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Coral Gables, Florida 33146

Re: *Franklin v. Health & Tennis Corporation of America, etc.* Case No. 92-1702-CIV-MARCUS

Dear Bob:

We have reviewed your November 10, 1993 settlement offer carefully, and agree fully that any communications pertaining to settlement are governed by the principals underlying Rule 408 of the Federal Rules of Evidence.

I think you will agree that your settlement offer, boiled down to essentials, takes the most liberal possible view of Ms. Franklin's sales capabilities (in conflict with the assessment of her strongest supporter, Steward Dansby, that she was good but not top shelf), and then values your chances of prevailing its 60%.

Bally has mixed feelings about settling this case. On the one hand, litigation has its costs, and the amounts at

stake here are relatively small, which points to a value of achieving a reasonable settlement. On the other hand, we cannot ignore the clear contradictions and inconsistencies in the testimony of Franklin and her witnesses. Mark Seaman's strength as a witness, and the fact that this case is before a Judge that Bally has respect for, Judge Marcus. These considerations, and the low amounts at stake, point to trying the case, because we believe we should win it and also to help us as to other pending cases, both with the trial experience we would gain and the message that would be conveyed to the other plaintiffs.

Bally has weighed these considerations, and have authorized us to pursue a settlement with you if one can be made on a basis that fairly reflects the risks and the small amounts at stake. I am authorized to offer $17,500.00 in settlement of this case, but I caution that this offer is premised on a settlement being reached before we are forced to spend a week's worth of time and resources next week in order to prepare the case for trial. If no agreement can be reached before those depositions begin next week, then this offer must be withdrawn.

Bob, I hope that you and Scott will give this offer careful consideration. As I indicated to you before, I truly believe this is your weakest case, compared to either Anne Remond or Cindy Watson, and that Bally has offered a fair settlement of the small-dollars case. I look forward to hearing from you, and encourage you to contact me by telephone if that will facilitate resolution of the case.

Sincerely yours,

/s/ Bart Bixenstine
Barton A. Bixenstine

BAB/def

cc: Bally's Health & Tennis Corporation

Supreme Court, U.S.
FILED
APR 13 1998
CLERK

No. 97-1430

In The

Supreme Court of the United States

October Term, 1997

SCANDINAVIAN HEALTH SPA, INC.,

Petitioner,

vs.

ANDREA FRANKLIN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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Lutz Appellate Services, Inc.

COMPENSATING RESPONDENT'S COUNSEL FOR THE UNSUCCESSFUL CONSTRUCTIVE DISCHARGE CLAIM EXEMPLIFIES A RECURRING PROBLEM THAT VIOLATES BOTH THE SPIRIT AND THE LETTER OF TITLE VII.

Respondent's Brief in Opposition highlights the critical reason why the Court should grant review: Respondent's counsel pursued a groundless constructive discharge claim, to Respondent's eventual detriment, because they were worried about how much they would be paid, converted this case into a lawsuit over attorney fees, and now want to be compensated for their wasteful efforts. These problems are recurring; examples are increasing; and the problem remains even after the Civil Rights Act of 1991 was enacted.

The District Court's conclusion that the demotion and constructive discharge claims involved intertwined and overlapping facts[1] does not insulate Respondent's counsel from a reduced fee award. Under *Hensley v. Eckerhart*, 461 U.S. 424 (1983),

> [w]here a lawsuit consists of related claims . . . where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

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1. Respondent misleads the Court when it asserts that Scandinavian waived any challenges when it stated before the Eleventh Circuit that "the district court correctly noted that the operative facts relevant to Franklin's claims were intertwined and overlapping." What Respondent did not inform the Court was that the next sentence was, "The district court erroneously stopped its analysis at that point, summarily stating that an award of attorney fees was justified because of the existence of a central core of facts." (Appellate Brief at 49).

Id. at 439. Based upon Respondent's very limited success, the full fees awarded by the District is prohibited by *Hensley*.

The constructive discharge claim was an unqualified failure.[2] Respondent received a small monetary award, which was a fraction of what she demanded at trial, precisely because she lost her constructive discharge claim. Had she prevailed on that claim, she could have received nearly $150,000. Respondent conveniently neglects to mention that she likewise demanded, but failed to receive, injunctive relief, reinstatement, and/or front pay because she lost her discharge claim. The District Court's findings underscore the groundlessness of the discharge claim.[3]

Logic dictates that this strategy was pursued for two possible reasons: Either Respondent was trying to "piggyback" a short-term sexual harassment claim with limited damages onto a discharge claim with exponentially greater monetary potential, or Respondent's legal counsel was trying to justify their vast expenditure of time on such a small claim. The first endeavor failed, and the second should meet the same end.

It is the fractional monetary award and the absence of any nonmonetary relief that mandates a reduced fee for limited

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2. Respondent's efforts either to characterize her discharge claim or explain why she failed, while completely false, are beside the point. Respondent failed on that claim, and her recovery was reduced drastically as a consequence.

3. The District Court dismissed this claim because: (1) there was absolutely no evidence of sexual harassment following Respondent's demotion; (2) Respondent's fear that the sexual harassment would recur was unfounded; and (3) Respondent actually resigned voluntarily, despite being urged to stay, to take a better paying job following a company-wide compensation reduction that prompted many others to leave. *Liability Decision* at 37-38.

success. The reduction is based not upon, as Respondent contends, on a mere monetary comparison, but instead on the disproportion between a fee award and a judgment that includes no injunctive relief and a tiny monetary award. As *Hensley* and *Farrar v. Hobby*, 506 U.S. 103 (1992) mandate, a plaintiff that receives a fraction of an excessive demand is not entitled to a full attorney fee award.

That the 1991 Act provides greater monetary relief does not avoid the recurring situations that: (1) a plaintiff will receive a fraction of what was demanded, and yet the attorneys will be paid as if a complete victory occurred; or (2) relatively small claims will not be settled because plaintiffs' counsel will continue to pursue "long-shot" claims with much larger monetary potential with the comfort that their fees will be paid in full even if they lose those "long-shot" claims.

Respondent's predictable, albeit completely false,[4] accusation that Scandinavian unnecessarily complicated the lawsuit by conducting a "scorched-earth" strategy, is irrelevant to the central issue of this dispute. As Scandinavian indicated before, nearly two-thirds of the time spent by Respondent's counsel occurred after the $24,000 offer was rejected in January 1994. Respondent's attorney fees to that point totaled $63,772.50 (and all but two depositions had been taken to that point). The remaining $100,000 subsequently was spent on

4. All thirteen witnesses deposed by Scandinavian's counsel were identified by Respondent either in her interrogatory responses or in her deposition, and they subsequently were listed by Respondent as trial witnesses. Ironically, Respondent called only six of those persons as trial witnesses. Thus, it was Respondent's counsel who made the case unnecessarily complicated by identifying, and forcing, Scandinavian to depose useless witnesses. Moreover, Respondent insisted throughout that Bally Manufacturing also was her employer, which, according to the District Court, was not supported by any evidence.

trial preparation, trial, and post-trial briefing that was avoidable if the offer had been accepted.

Finally, this case could have settled with a greater benefit to Respondent, and at a far less cost to the courts and Scandinavian's legal counsel, if Respondent's legal counsel had not rejected a settlement offer solely because they were not receiving enough money. In fact, the only accurate statement found in Respondent's Brief in Opposition is why Respondent's legal counsel rejected the settlement offers, and it underscores why the Court must accept this case. Respondent's counsel would have forced their client to turn over the entire settlement to them and then be responsible for paying the difference. (*See* Brief in Opposition, at 8-9). The fact that Respondent's counsel admittedly placed their interests ahead of their client, and needlessly litigate the lawsuit because they were not receiving enough out of the deal, exemplifies perfectly the abuses that have occurred recently under the attorney fees statutes. If Respondent's counsel truly were concerned about their client's best interests, they could have: (1) accepted the standard one-third contingency, which would have left their client with nearly as much, if not more (depending upon which settlement offer was accepted) than the final judgment; or (2) counteroffered to leave attorney fees an open issue and move for their fees as a prevailing party. They did neither, instead using the leverage of attorneys fees to reject settlement offers worth more than their only viable claim. Consequently, their client and Scandinavian have suffered, while only they stand to be rewarded.

It is precisely these tactics of Respondent's counsel that must be stopped. These tactics will remain an obstacle to reasoned settlements even in the aftermath of the Civil Rights Act of 1991 unless this Court does something about it.

CONCLUSION

For these reasons, as well as those set forth in the Petition, the Writ of Certiorari should be granted.

Respectfully submitted,

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